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*India. laws, statutes, etc. Procedural (and)
With the Author's Comments*

ACT XIV OF 1859

c7

REGULATING

THE

LIMITATION OF CIVIL SUITS

IN

BRITISH INDIA:

WITH A COMMENTARY

BY

NINIAN HILL THOMSON, Esq., M. A.

MEMBER OF THE FACULTY OF ADVOCATES IN SCOTLAND.

SECOND EDITION.

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AUG 17 1919

L. W. Carr

P R E F A C E.

Since the publication of the first edition of this treatise numerous questions relating to the Law of Limitation in India have been determined. The substance of these decisions has been incorporated in the present volume, which purports to contain a full analysis of all the more important reported rulings of the Indian High Courts and of the Privy Council, on questions arising under Act XIV of 1859, from the time when that Act came into operation.

Act XIV of 1859 as eventually passed, was a fragment only of a larger measure framed by the Indian Law Commissioners for regulating the acquirement and extinction of rights in this country by Prescription, and for the Limitation of Suits. An account of the history of that measure and of the former state of the Law of Limitation in India, will be found in the speech of Sir James Colville when moving the first reading of the Draft Act in Council on the 7th July 1855.* Much information in connection with the same subject will also be found in the Special Reports

* See the Proceedings of the Legislative Council of India for the years 1854-1855, Vol. I. p. 544. The Clauses of the Draft Act which related to the acquisition and extinction of rights by Prescription were struck out on the 2nd February 1859, a majority of the Council being of opinion:—"that a law of positive prescription would not be understood by

the people, and would be regarded by them as doing violence to their feelings, prejudices, and ideas of what was just: that there would be great difficulty in working such a law in an equitable manner: and that no absolute necessity for its enactment had been shewn to exist." See the Proceedings of the Legislative Council of India for the year 1859, Vol. V. pp. 47-55.

of the Indian Law Commissioners for the years 1843 and 1844.

Considering the care with which, as is seen from these Reports, the Indian Limitation Act was prepared, the length of time—nearly twenty years—during which it was being matured, and the conspicuous ability of the eminent lawyer by whom it was finally reduced into its present form, it may seem remarkable that almost every one of its Sections should in turn have been found open to a diversity of constructions. This result is partly, perhaps, attributable to the extreme brevity of the Act itself occasioning obscurity in its provisions, partly to the recognized difficulty of framing any law embracing subjects of great extent and detail which in its operation shall be found free from uncertainty in many circumstances, but still more, it may be thought, to an unconscious tendency on the part of Judicial Officers, where the right of a particular plaintiff seems conclusively established, so to construe the terms of the Law as that they shall not conflict with what appears to be the equity and justice of the case.

As the principles of expediency on which all Laws of Limitation rest may be found explained in numerous legal text-books, it is unnecessary to refer to them here further than to point out that it is essential for the public interest that the provisions of such Laws should in all cases be rigidly enforced, and should never be relaxed on considerations of individual hardship.

In attempting to explain the provisions of the Indian Limitation Act by a collection of decided cases, it does not seem desirable to have recourse to illustrations borrowed from the decisions of the English Courts. As the Laws of Limitation in England and in India, although containing much in common, are not identical, decisions

pronounced under the former could not safely be accepted as precedents in construing the latter, without a careful examination and comparison of the terms of both.

The account of the old Limitation Laws in India, and the analysis of the decisions of the Indian Courts under these Laws given by Mr. Macpherson in his work on the Procedure of the Civil Courts in British India, are so complete, that it would be superfluous to do more than refer those who may desire to compare the provisions and operation of the present with those of former Laws, to Mr. Macpherson's valuable book.

Several important cases recently decided, will be found referred to in the notes added by way of an Appendix, in which reference is likewise made to the repeal of certain Sections of the Limitation Act, by Act XIV of 1870.

N. H. T.

Calcutta, 1st May, 1870.

ABBREVIATIONS.

Agra,	Reports of cases decided by the High Court of the North West Provinces at Agra, from June, 1866, to December, 1868.
Agra, MIS.	Ditto, decisions in Miscellaneous Appeals.
Agra, F. B.	Ditto, decisions of the Full Bench.
All.	Reports of cases decided by the High Court of the North West Provinces at Allahabad from January, 1869.
Ben.	Bengal Law Reports.
Ben. A. C.	Ditto, decisions of the Calcutta High Court in its ordinary Civil Appellate Jurisdiction.
Ben. O. C.	Ditto, decisions of the Court in its ordinary original Civil Jurisdiction.
Ben. { AP. } { S. N. }	Ditto, short notes of cases printed in Appendix to the Reports.
Ben. P. C.	Ditto, decisions of the Privy Council in appeals from Bengal.
Bom.	Bombay High Court Reports.
Bom. A. C.	Ditto, decisions of the Court in its ordinary Appellate Civil Jurisdiction.
Bom. O. C.	Ditto, decisions of the Court in its ordinary Original Civil Jurisdiction.
Bourke,	Bourke's Calcutta High Court Reports.
Coryton,	Coryton's Calcutta High Court Reports.
Hay,	Calcutta High Court Reports,—1862 to 1863,—published by G. C. Hay & Co.
Hyde,	Hyde's Calcutta High Court Reports,—1862-1864.
Ind. Jur.	Indian Jurist Reports.
Ind. Jur. N. S.	Indian Jurist Reports, New Series.
Mad.	Madras High Court Reports.
Mad. Jur.	Madras Jurist Reports.
Marsh.	Marshall's Reports of cases decided by the Calcutta High Court.
Moore's I. A.	Moore's Reports of cases decided by the Privy Council on appeal from the East Indies.
Mof. S. C. Ct. Ref.	Sutherland's Reports of cases decided by the Calcutta High Court on references from Mofussil Small Cause Courts.

S. D.	Decisions of the Bengal Sudder Court recorded in conformity with Act XII of 1843.
W. R. ...	Sutherland's Weekly Reporter. Cases decided by the Calcutta High Court in its ordinary Civil Appellate Jurisdiction.
W. R. { C. R. CIV. REF. }	Ditto, cases decided by the Calcutta High Court on references from subordinate Civil Courts.
W. R. F. B.	Ditto, Full Bench decisions.
W. R. MIS.	Ditto, decisions in Miscellaneous Appeals.
W. R. S. C.	Ditto, decisions on references from Mofussil Small Cause Courts.
W. R. W. L. R.	Ditto, decisions on references from the Special Courts created under Act XXIII of 1863, for the trial of claims to Waste Lands.
W. R. X.	Ditto, decisions under Act X of 1859.
W. R. P. C. ...	Ditto. Reports of cases decided by the Privy Council.
W. R. SP.	Ditto, "Special Number," containing the Full Bench Rulings of the Calcutta High Court in its Civil Appellate Jurisdiction from July, 1862, to July, 1864.
W. R. 1864,	Ditto, decisions of the Calcutta High Court in its Appellate Civil Jurisdiction from January to July 1864.
Wym.	Civil, Criminal and Revenue Reporter, published by Wyman & Co.

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CORRIGENDA.

Page 10, lines 4 and 5, from top, for "*Sabuji*" read "*Saluji*" for "*Islamsangji*" read "*Jalmsangji*," and for "2 Bom. 169." read "2 Bom. 162."

„ 177, in heading, for "Section 1, Clause 13," read "Section 1, Clause 12."

„ 275, line 3 from bottom, for "p. 233," read "p. 232."

ACT No. XIV of 1859.

Passed by the Legislative Council of India. Received the Assent of the Governor-General on the 5th of May, 1859.

AN ACT TO PROVIDE FOR THE LIMITATION OF SUITS.

WHEREAS it is expedient to amend and
Preamble. consolidate the laws relating to the limitation of suits; It is enacted as follows :—

1. No suit shall be maintained in any Court
Limitation of suits. of Judicature within any part of the British territories in India in which this Act shall be in force unless the same is instituted within the period of limitation hereinafter made applicable to a suit of that nature, any Law or Regulation to the contrary notwithstanding; and the periods of limitation, and the suits to which the same respectively shall be applicable, shall be the following, that is to say :—

A LAW limiting the period within which suits must be brought, is to be construed strictly; and where the Legislature has not expressly limited the time for suing, the Court will not readily, if it will under any circumstances,

prescribe a limit, merely because there is reason to infer that the Legislature intended to prescribe that limit, although it has accidentally omitted to do so. *Syed Mahomed Afzul v. Kanhya Lal*, 2 W. R. 263.

In a Court of original jurisdiction, the issue of limitation should be considered and determined by the Judge, although not urged in the pleadings. Where it appears on the trial of any case, that the suit has been commenced after the period of limitation applicable to it has expired, the Judge is bound to hold that it cannot be maintained, notwithstanding that the defendant has not pleaded limitation as a defence. *Payne v. Constable*, 1 Ben. o. c. 49.

Much discussion has arisen as to whether a plea of limitation which has not been put forward in a Court of first instance, can be considered when taken for the first time in a Court of appeal. The words of the Section to the effect that after the periods prescribed by the Act "no suit shall be maintained," might seem to leave no discretion to any Court, whether original or appellate, to entertain a suit to which the rules of limitation can be applied. In this view, it would be incumbent upon a Court of appeal to consider and give effect to a plea of limitation, even although such plea had not been urged in the subordinate Court. It is to be observed, however, that the words used in this Section, are not in themselves more stringent than those employed in Section 14, Regulation III of 1793, in Regulation II of 1805, and in Section 3, Act XIII of 1848: and as it has been held in various cases that the prohibitory provisions of these enactments will not warrant a plea of limitation being considered in a Court of appeal, when it has not been taken in the Court of first instance, it would seem to follow that the words of this Section also, standing by themselves, must be similarly construed.

The conflict of opinion which has arisen both under former laws and under the present Act, as to the time

when limitation may be pleaded, may be illustrated by the following cases. Under Section 14, Regulation III of 1793, by which the Zillah Courts are prohibited "from hearing, trying, or determining any suit whatever, if the cause of action shall have arisen twelve years before any suit shall have commenced on account of it," it was held by the late Sudder Court in the case of *Rama Singh v. Dhyani Singh*, S. D. 1849, p. 126, that a Court of appeal was bound to take up and enforce the rule of limitation, at any stage of the proceedings. Again, in the case of *The Government of Bengal v. The Maharajah of Burdwan*, 4 Moore's I. A. p. 466, in which it appeared that the right of the Government to sue, was barred by the rule of limitation contained in Clause 3, Section 3, Regulation II of 1805, which enacts that nothing shall be held to authorize the cognizance of any suit whatever in any Court of justice if the cause of action shall have arisen sixty years before the institution of such suit, the Privy Council admitted the plea of limitation at the last stage of the proceedings, and disposed of the claim upon that issue. In this case, however, it was assigned by their Lordships as a special reason for admitting the plea of limitation, when it had not been pleaded in the Court below, that the proceedings in the case were not in the nature of a regular suit.

But in the case of *Enambandi v. Hurgobind Ghose*, 4 Moore's I. A. p. 403, in which the late Sudder Court had reversed the decision of an inferior Court, and dismissed the suit on the ground that it was barred by limitation under Section 14, Regulation III of 1793, the Privy Council set aside the decision of the Sudder Court, holding that as the plea of limitation had not been raised in the original pleadings, and the plaintiff, consequently, had not had an opportunity of meeting it, it was inadmissible on appeal. In conformity with this precedent, the Sudder Court in the case of *Nursing Deb*

v. Ryemoney Debea, S. D. 1859, p. 372, on an application for review of a previous judgment of the Court, in which effect had been given to a plea of limitation, under Act XIII of 1848,* which had not been taken in the lower Courts, held that when a plea of limitation is not originally urged in the pleadings in bar of suit, a defendant cannot be allowed to bring it forward on appeal, but must be understood to have waived it and to be willing to have the case tried upon its merits. So, also, in the case of *Nundololl Haldar v. Radha Mohun Haldar*, 2 Hay, 49, it was held by the High Court that where a plea of limitation under Section 3, Act XIII of 1848, had not been taken by the defendant in the Court of first instance, the Court of appeal was wrong in raising the issue. The same view was also followed in the case of *Budhoo Dossee v. Muddun Gopal Rukheet*, W. R. 1864, p. 207, in respect of a plea of limitation under Section 246, Act VIII of 1859.

Since Act XIV of 1859 came into operation, various cases have been decided which would seem to shew that under that Act a plea of limitation may sometimes be considered by a Court of appeal, although it has not been set up by the defendant in the lower Court. Thus in the case of *Kishen Chunder Ghose v. Ashoorun, Marsh.* p. 647, heard by the High Court on special appeal, there being reason to suppose that the plaintiff's claim, which had been dismissed upon the merits by the Court of first instance, and subsequently decreed by the lower appellate Court, would be found to be barred by the law of limitation, the Court remitted the case with a direction that the issue should be raised and tried. So, also, in the case of *Poornima Chowdhrair v. Wise*,

* Section 3, Act XIII of 1848 provides that no suit for contesting an award of the Revenue Authorities made after the passing of the Act, shall be entertained after the expiry of three years from the date of the final award.

6 W. R. 129, it was held, on a special appeal to the High Court, that a plea of limitation in a claim for *wasilat*, although not taken in the lower Courts, might be taken in a Court of appeal, inasmuch as the bar was patent on the face of the plaint, and the failure to give effect to it involved a substantial error in law which ought to be amended at any stage of the proceedings. The Court accordingly, without remanding the case, amended the judgment of the lower Court by disallowing so much of the claim as was barred by limitation.*

The case of *Ramessur Ghose v. Khetter Mohun Ghose*, 3 W. R. 184, was remanded by the High Court with a direction to the lower Court to try properly the special plea of minority set up by the plaintiff as the ground upon which he claimed exemption from the general law of limitation under which his suit would have been barred. On remand, the lower Court held that as the plaintiff had sued within twelve years from the time he attained majority, his suit was not barred. On appeal from this decision it was contended by the defendant that as more than twelve years had elapsed from the time when the cause of action arose, the plaintiff was entitled, under Section 11, Act XIV of 1859, only to three, and not to twelve years from the date of his majority within which to bring his suit, and that having suffered more than three years to elapse before he instituted his suit, limitation applied. This point had not been taken when the case was originally heard on appeal and remanded, the only objection then made being, that the lower Court had erred in its calculation of the time at which the plaintiff attained majority, and, that there was no proof that he had brought his suit within twelve years from that date. The Court was,

* In this case the Court held lower Courts he was not entitled that as the appellant had not to the costs of the appeal. taken the plea of limitation in the

nevertheless, of opinion that as the new objection was patent on the face of the plaint, and moreover involved a question of jurisdiction, it might even at that stage of the proceedings be taken up and determined, notwithstanding the laches of the defendant in not pleading it before. In conformity with these decisions see also the cases of *Anundee Koonwur v. Thakoor Panday*, 4 W. R. MIS. 21, and *Gour Monce Dabca v. Tiluck Chunder Goocho*, 6 W. R. MIS. 92. In the latter case it was observed by L. S. JACKSON, J. :—"It was objected by the respondent that this plea (of limitation) had not been taken either in the Court of the Principal Sudder Ameen, or in the lower appellate Court; that consequently, it was not open to the appellant to urge it here. But as the objection is one which goes to the competency—to the jurisdiction that is—of the Court, it appears to me that it can be taken, and ought to be taken up in this Court." Similarly, in the case of *Parushnath Misser v. Shaikh Bundah Ali*, 6 W. R. 132, TREVOR, J. expressed himself as "clearly of opinion that, under Act XIV of 1859, whether a defendant raises the plea of limitation or not, it is incumbent on the Court to see that it has jurisdiction, and if that jurisdiction has lapsed by efflux of time, to refuse to exercise a jurisdiction which it has not by law." Again, in the case of *Taroo Mytee v. Obhoy Koolya*, 11 W. R. 288, MARKBY, J. said :—"I do not think it necessary in this case to express any distinct opinion as to the circumstances under which a Court in regular appeal, may, or may not entertain a question of limitation. This point is open to considerable doubt, and is one upon which the decisions of this Court as well as of the Privy Council are conflicting. But I think it quite certain that there are some cases in which a Court of regular appeal, has power to raise that issue, although the Court of first instance has not raised it in distinct terms."

The tendency of the above cited decisions is to shew

that a Court of appeal may competently raise and try an issue of limitation under Act XIV of 1859 which has not been advanced or considered in the Court of first instance. But there are, on the other hand, numerous cases of a directly contrary authority. Among these, it may be sufficient to refer to the cases of *Ramadheen Misser v. Bechoo Misser*, W. R. 1864, p. 212, *Digumburee Dabea v. Nund Gopal Banerjee*, 1 W. R. MIS. 1; *Leelanund Singh v. Purbhoo Narain Singh*, 2 W. R. 256.

In the case of *Kashee Chunder Turkobhoosun v. Kally Prosonno Chowdhry*, 9 W. R. 452, the plaintiff sued to set aside a survey award under colour of which he had been dispossessed of certain lands. The case coming before the High Court in special appeal, the defendant pleaded that the claim was barred under Clause 6, Section 1, Act XIV of 1859, since it was not brought within three years from the date of the award. The Court observed:—"We find that this objection, although somewhat feebly made in the Court of first instance and there overruled, was not brought before the lower appellate Court at all. We therefore decline to entertain it. Had this plea of limitation been pressed before the lower appellate Court, the plaintiff would have had the opportunity of satisfying that Court upon the facts, that although a period of more than three years had perhaps elapsed, still under all the circumstances of the case, the plaintiff had extended time for the bringing of the suit. Sitting here as a Court of special appeal, we cannot determine any matter of fact, and we must take the case, as regards the defendant, in the condition in which he chose to leave it in the lower appellate Court."

In the case of *Kedarnath Mookerjee v. Muthuranath Dutt*, 1 Ben. A. C. 17, it was observed that "the rulings of the Court (the Calcutta High Court) which lay down that limitation, being a question bearing on jurisdiction, may be taken up at any time whether pleaded or not,

refer to cases where the defect is patent on the record, and not to those which would require further investigation to ascertain whether there was a defect or not."

In the case of *Mozuffur Ally v. Girish Chunder Das*, 1 Ben. A. C. 25, the Judge of an appellate Court disposed of a claim for the possession of certain lands, on an issue of limitation which had not been noticed in the inferior Court, and which was not pleaded by the defendant in the Court of appeal. On special appeal it was objected that the Judge was wrong in raising the question of limitation, and the High Court was of opinion that the objection must be allowed. The Court observed :—"The rulings of this Court, to which the Judge alludes, go no further than this: that where a plaintiff is barred on the face of his own plaint, an appellate Court is justified in raising the issue although it has never been raised below. This refers to cases where a plaintiff sues for arrears of rent for six years, or for *wasilat* for twelve, and such like, where the very recital of the plaint shows a considerable portion of the relief sought to be impossible under the limitation laws."

It is plainly impossible to reconcile all the decisions which declare that the plea of limitation may be raised for the first time in a Court of appeal with those which declare that it may not. It may be observed, however, that the opinion expressed by the Court in a number of the cases in which the plea of limitation was allowed to be raised on appeal, that the plea *involves a question of jurisdiction*, has been negatived by a bench of three Judges in the case of *Payne v. Constable*, 1 Ben. o. c. 49, in which it was unanimously held that a question of limitation under Act XIV of 1859, is not a question of jurisdiction in the proper sense of the word.

Admitting that the prohibitory provisions of Act XIV of 1859, do not oust jurisdiction, and that standing by themselves they cannot, any more than similar pro-

visions in former laws, be taken to render it incumbent on an appellate Court to take up a question of limitation which has not been raised in the inferior Court, it may still be thought that the rules of procedure contained in Act VIII of 1859, materially alter the duties imposed upon Civil Courts in dealing with questions of limitation. Section 26 of that Act provides that in instituting a civil suit "if the cause of action has accrued beyond the period ordinarily allowed by any law for commencing such a suit," the plaint shall state "the ground upon which exemption from the law is claimed:" and Section 29 provides that if such ground be not stated, "the Court may reject the plaint, or at its discretion may allow the plaint to be amended." Section 32 of the same Act provides that "if upon the face of the plaint, or after questioning the plaintiff, it appear to the Court that the * * * right of action is barred by lapse of time, the Court shall reject the plaint." These provisions imply that Civil Courts are bound in all cases, of their own motion, to consider and dispose of the issue of limitation, and further indicate that if this duty be neglected by the Court of original jurisdiction, it will then be the duty of the appellate Court to rectify the omission, and to apply the rule of limitation at whatever stage of the proceedings it may be found to have a bearing on the claim. In this view, the theory of waiver by the defendant would be inadmissible, and questions of limitation arising for the first time in an appellate Court would fall to be dealt with, either by remand to the lower Court, if further evidence were required, or by trial in the appellate Court itself, if there were such evidence before the Court as allowed of that course being adopted.

The more recent rulings of the Bombay High Court would seem to sanction this view. In various cases decided by that Court,—as in the case of *Dutaji*

bin Narayan v. Wamanrao, 1 Bom. 15,—it had been held that the plea of limitation, if not raised in the Court of first instance, could not be considered on appeal. But in the later case of *Sabuji Kesraji v. Rajsangji Islamsangji*, 2 Bom. 169, it was decided that as Section 32, Act VIII of 1859, imposes upon a Court of first instance the duty of taking any legal objection on the face of the plaint, the fact that a portion of a claim is evidently barred by the law of limitation, from which no ground of exemption is stated, is an objection which ought to be noticed by the Court when receiving the plaint, or if not noticed then, may be noticed at any subsequent stage of the suit; and further that as under Section 334 of the same Act, it is provided that an appellate Court in deciding a case brought before it on appeal, shall not be confined to the grounds set forth by the appellant, such a Court is bound on appeal to give judgment according to the law of limitation applicable to the case stated by the plaintiff himself, even although the objection may not have been raised in the grounds of appeal; and the omission on the part of the Court to do so is an error or defect in the decision of the case, and is a ground of special appeal.

In the decisions of the Madras High Court a distinction is drawn between cases of regular and cases of special appeal. In the case of *Narasu Reddi v. Krishna Padayachi*, 1 Mad. 358, it was held that in *regular* appeal where the Statute of Limitations is not pleaded in the original Court, it may be so in the appeal Court, if evidence can be taken there in reply to the plea; but that on *special* appeal the Statute of Limitations cannot, for the first time, be pleaded, unless the facts which raise the plea are admitted. In the case of *Ramanatha Mudali v. Vaithalinga Mudali*, 2 Mad. 238, the plaintiff sued for money due by the defendants on a settlement of accounts, and obtained a judgment on the merits, which was confirmed

on regular appeal. The defendants then presented a special appeal, in which, for the first time, they relied upon a plea of limitation under Act XIV of 1859. The case of *Narasu Reddi*, and the case of *The Government of Bengal v. The Maharajah of Burdwan*, 4 Moore's I. A. p. 466, were referred to as shewing that the plea of limitation could be set up for the first time upon special appeal. But it was held by the Court that limitation, if relied on as a ground of defence, should be pleaded in every case in the original Court. It was observed that the case of *Narasu Reddi* introduced new law, and that the Court was unwilling to carry the principle therein laid down further than the actual words used might require, and that these were inapplicable to a case in which the facts raising the plea are not admitted by the plaintiff. It was further observed that in the *Maharajah of Burdwan's* case there were no pleadings in the Court below, the investigation being irregularly conducted, without any opportunity being given of raising the issue of limitation until the case came before the Privy Council.

Again, in the case of *Sarasvati v. Pachanna Setti*, 3 Mad. 258, in which the plea of limitation had not been taken in the Court of first instance, nor at first in the lower Appellate Court, but was subsequently raised in a petition to the latter Court for a review of its judgment, it was held by the High Court that the application for review being part of the proceedings in regular appeal, and it being clear upon the admitted facts that the claim was barred by limitation, the defendant was not too late in raising the plea in his application for review. Reference was made in this case to the decisions in *Narasu Reddi*, and *Ramanatha Mudali*, and also to an unreported case in which the Court had allowed the bar to be pleaded before it for the first time in a regular appeal, and in which, the facts of the case being clear, it had declined to send down an issue to the inferior Court, no suggestion

having been made on the part of the plaintiff that there existed any evidence to meet the bar.

The distinction drawn by the Madras Court in these decisions between cases of regular and special appeal, appears to rest upon the provisions of Section 372, Act VIII of 1859, in which it is directed that a special appeal shall lie "from all decisions passed in regular appeal by subordinate Courts, on the ground of the decision being contrary to some law or usage having the force of law, or of a substantial error or defect in law in the procedure or investigation of the case *which may have produced error or defect in the decision of the case upon the merits*, and on no other ground." It would seem to have been the opinion of the Court that the omission by a subordinate Court to notice and determine an issue of limitation, is not an error or defect in the decision of a case on the merits.

Similar uncertainty has prevailed as to whether questions of limitation arising under the provisions of Act X of 1859, can be considered by an appellate Court, when the plea has not been raised in the Court of first resort. The point was negatively decided in the case of *Huro Soonduree Dabea v. The Collector of Rajshaye*, W. R. 1864, x. 6, in the case of *Ranee Suvarnamayi v. Singhroop Baboo*, W. R. 1864, x. 133, and in the case of *Clarke v. Brindabun Chunder Sirkar Choudhry*, W. R. 1864, x. 9, but affirmatively held in the case of *Kewell Jut Roy v. Mahomed Dad Khan*, (No. 2037 of 1863). In this last case the Judges are reported to have said:—"In taking up this appeal, we observe that a considerable portion of the claim for rent is barred by limitation; neither the Deputy Collector nor the Judge appears to have been aware of the fact, and the objection is not even now taken before us in special appeal." Under such circumstances, it might have been thought that the plea of limitation should have been held

to be waived, but the Court, nevertheless, disallowed so much of the claim as was found to be beyond time. The view taken in this case was followed in the case of *Sushteebur Mookerjee v. Mackenzie*, 2 W. R. x. 76, in which it was observed that although the defendant did not raise the plea in bar of suit, still, as the plaint clearly showed that the claim was barred, and as there are rulings of the Court that the question, being one of jurisdiction, can be raised at any stage of the case, the claim must be dismissed; and that it was needless to remand the case for further evidence, since it was patent on the face of the plaint itself that it was barred.

But the opinion indicated in the last two cases cited, does not accord with the view expressed in the more recent case of *Kisto Chunder Chatterjee v. Ram Lochun Roy*, 4 W. R. x. 47. In this case a lower appellate Court had dismissed a suit as barred by limitation under Section 77, Act X of 1859, although the objection had not been taken in the Court of first instance. This decision was held by the High Court to be erroneous. The Court observed:—"There are no doubt instances,—as possibly by the terms of Section 1, Act XIV of 1859,—in which the Courts are expressly denied jurisdiction to entertain suits brought after a prescribed period; but in these instances the taking away of jurisdiction must plainly appear from the words of the enactment. Where it does so appear, it must be acted upon, wherever, and at whatever stage the Court discovers the want of jurisdiction. But where the words are otherwise, and merely give a privilege to the defendant, it is for him to avail himself thereof at the earliest opportunity by pleading the limitation; and it is neither competent to him afterwards, nor to an appellate Court of its own motion, in such a case, to raise an objection which has at first been pretermitted."

As to this decision, it may, however, be remarked that in the first place, according to the decision in *Payne v. Constable*, 1 Ben. o. c. 49, the terms of Section 1, Act XIV of 1859, do not raise a question of *jurisdiction*; and in the second place, that the words of the *proviso* in Section 77, Act X of 1859,—“provided always that the decision of the Collector shall not affect the right of either party who may have a legal title to the rent of such land or tenure, to establish his title by suit in the Civil Court if instituted within one year from the date of the decision”—although in form permissive, are in effect prohibitory of any suit being brought in the Civil Court after the period fixed has elapsed. Where the law says that a suit may be brought within one year, it must be understood to mean that it shall not be brought after that time; and there is nothing in the words used in Section 77 to indicate that it was the intention of the Legislature merely to confer upon the defendant the privilege of electing whether he shall allow the suit to proceed or not. It might further be contended in respect of the case of *Kisto Chunder Chatterjee*, that the suit being brought under Act VIII of 1859, both the original and the appellate Courts were bound by the terms of Sections 32 and 334 of that Act, to give effect of their own motion to the law of limitation, even although the plea was not taken by the defendant.*

A defendant appealed on a question of limitation, and the lower appellate Court, holding that limitation did not apply, remitted the case to be tried on its merits, and these were decided against the defendant in the Court of first instance, and afterwards in the lower appellate Court. The defendant then brought a special appeal

* With regard to the effect to be given to the provisions of Section 77, Act X of 1852, in barring civil suits, see the cases of *Chunder Sheekhur Roy*, 2 W. R. 197, and *Ram Komul Sein v. Prossonno Moyee*, 8 W. R. 294.

in the High Court in which he again pleaded that the suit was barred by limitation. It was held that he ought to have appealed when the point of limitation was originally decided by the lower appellate Court, and that he could not appeal upon that ground after the case had been decided upon the merits. *Beekun Kooer v. Maharajah Bahadoor*, Marsh. p. 66. In the case of *Shaik Warris Ally v. Oozeerun Beebee*, 1 W. R. 51, it was held that the order of a Judge overruling the defence of limitation, and remanding the suit for trial on the merits, if not immediately appealed against as a decree, may as an interlocutory order, be objected to when the ultimate decision is appealed against. But in the case of *Mahomed Anjob v. Gouripershad Shaw*, 6 W. R. 62, an opinion was indicated that the order of a Judge reversing a decree passed by an inferior Court on the issue of limitation, and remanding the case to be tried on its merits, is not an order prior to decree within the meaning of Section 363, Act VIII of 1859, but is in itself a decree from which an appeal will lie. The point was further discussed by a Court of five Judges in the case of *Mirza Himmud Bahadoor v. Gobindo Panday*, 5 W. R. 91, in which the plaintiff, a mortgagee, sued for foreclosure. The defendant alleged that the mortgagor having become a rebel, his property had been confiscated by the Government from whom he, the defendant, had bought it, and that as the plaintiff's suit had not been brought within one year from the date of sale, it was barred by Section 30, Act IX of 1859. The Moonsiff in whose Court the suit was brought, accordingly dismissed it as barred by limitation: but on appeal, the Principal Sudder Ameen, holding that limitation did not apply, remanded it for trial on the merits, *i. e.* for a decision as to whether the mortgage was collusive or not. On remand, the Moonsiff, holding the mortgage to be *bona fide*, decided the case in favour of the plaintiff. The defendant again appealing, the

Principal Sudder Ameen dismissed the suit upon the merits, refusing to re-try the issue of limitation, on the ground that no special appeal had been presented against his former order on that issue. Against this decision a special appeal was preferred to the High Court by the plaintiff, whose suit had been dismissed; while on the other hand, the defendant, by way of cross appeal under Section 348 of Act VIII of 1859, contended that limitation applied. For the plaintiff it was urged that as the issue of limitation had been determined by the lower appellate Court prior to the remand, and as no appeal had been preferred against that decision at the time when it was passed, the defendant could not take the objection at a later stage of the proceedings. In deciding this issue, the Court held that the first decision of the Principal Sudder Ameen reversing the decree of the Moonsiff on the issue of limitation, was not a mere order prior to decree, but was itself a decree, and might consequently have been appealed against by the defendant. When the defendant subsequently appealed against the decision of the Moonsiff upon the merits, he could not ask the lower appellate Court to allow him to appeal to it from the former decision which it had itself pronounced on the issue of limitation; and when the lower appellate Court dismissed the suit upon the merits, there was then no occasion for the defendant to appeal to the High Court against that decision. If the lower appellate Court had upheld the decision of the Court of first instance on the merits, the defendant might clearly have applied to the High Court to enlarge the time for his appealing against the decision of the lower appellate Court upon the issue of limitation; and if he had done so, the Court might have granted his application, if he could show sufficient cause, and in all probability the remand would have been deemed sufficient cause, for enlarging the time. But when the plaintiff appealed to the High Court against the decision

of the lower appellate Court on the merits, the respondent had the right, under Section 348, Act VIII of 1859, to rely upon any objection as if he had himself preferred a separate appeal. The Court observed : " the word decision used in the Section cited, must mean a decision upon the whole case ; and we are of opinion that the defendant respondent, had the right upon the hearing before the Division Court, to object to the first decree in the suit which was against him on the issue of limitation."

The opinion expressed in the above decision, that under the provisions of Act VIII of 1859, it is not necessary for a defendant respondent to file a separate petition of appeal against the ruling of a lower Court on the point of limitation, but that the point may without such separate appeal be raised by a respondent under Section 348 of that Act, had previously been intimated in the case of *Okhatoonissa v. Koochil Sirdar*, 2 W. R. 45.*

Where a Court of first instance decided the issue of limitation in favour of, but the other issues against a plaintiff, and the appellate Court, without passing any judgment on the issue of limitation, remanded the case for further investigation on the merits, it was held that it was competent for the appellate Court, when the whole case again came before it, to try the issue of limitation. *Woonkur Pershad Rustobee v. Phool Koomarce Beebee*, 7 W. R. 67.

Where in reply to a plaintiff's claim for recovery of possession of certain lands, the defendant alleged that he had been in possession of the lands in dispute for more than thirty years, the allegation was held clearly to raise

* The views expressed in these cases are in accordance with the ruling of the Calcutta High Court in the case of *Hills v. Issur Ghose*, 1 Hay, 350. The rule of procedure followed by the Madras High Court is different. In the case of *Makudu Ravellan*

v. Mastan Sahib, 1 Mad. 102, it was held that on special appeal, a respondent has no right to take any objection to the decision appealed against, which he might have taken if he had himself preferred a special appeal.

the issue of limitation, although the express words that the suit "was barred by limitation" were not actually used by the defendant. *Shaikh Imdad Ali v. The Collector of East Burdwan*, W. R. 1864, p. 358.

Where a plaintiff sued for possession of two parcels of land from which he alleged that he had been dispossessed by the defendant, and the claim was dismissed as to one parcel on the plea of limitation, the plaintiff having failed to prove possession within twelve years next before the institution of the suit, it was held that although the defendant had not specifically pleaded limitation with respect to the other, yet as the plaintiff admitted that his cause of action with respect to both arose simultaneously, he was bound to show that his dispossession from the second also took place within twelve years before action brought. *Mowajin Hossein v. Rajkoomaree Dossee*, 2 Hay, 177.

Where an issue of limitation is raised and tried in a Court of first instance, it must be considered and determined in the Court of appeal. *Narain Doss v. Greesh Chunder Roy*, 1 W. R. 59; *Prokash Chunder Dutt v. Shumbhoo-nath Chowdry*, 8 W. R. 272. Where it was contended in special appeal that a plea of limitation taken in the lower Court had not been considered there, it was held that the mere fact of the lower Court having entered into the merits of the case after noticing in its judgment that limitation had been pleaded, shewed that the point of limitation had been overruled. *Ramnath Sein Lushkur v. Wise*, 1 Hay, 310. In this case the Court said:—"The lower Court disposes of the question of limitation by finding that it is only *recently*—*within the last few years*,—that the defendant has got into possession." This, however, can scarcely be considered a distinct finding, such as has been required in other cases. *Bhugwan Chunder Nundee v. Kedarnath Acharjee*, 2 W. R. 153.

A defendant under examination in a Court of first

instance, distinctly alleged that the plaintiff had no right in certain property under dispute, and had never been in possession thereof at any time. The lower appellate Court was of opinion that the plaintiff had not met this objection by any trustworthy evidence, and had failed to prove possession. It was held by the High Court on appeal that the lower appellate Court was legally warranted in deciding the case on the issue of the general law of limitation, although it had not been decided on that issue in the Court of first instance. *Smith v. Kishen Chunder Roy Chowdhry*, 6 W. R. 79.

Where there is nothing in the record to shew that the suit is barred by limitation, it has been held that an appellate Court is not bound to take up the plea. *Kalee Doss Chunder v. Beharee Lall Roy*, 8 W. R. 451. Accordingly, where in a suit for possession and mesne profits the defendant did not allege that he had been in possession for more than twelve years, but stood upon his title, it was held by the High Court that the lower appellate Court was wrong in dismissing the suit on the ground that the plaintiff's possession and dispossession within twelve years before action brought, had not been specially shewn. *Mahomed Khossal v. Lal Chand Doss*, 5 W. R. 228.

Where a case was remanded by a lower appellate Court on a point affecting the merits, and the defendant after that point had been tried and decided against him, then, for the first time, raised the question of limitation, it was held by the High Court on special appeal that the lower appellate Court had properly refused to enter upon that question. *Sreenath Bose v. Buzl Ruheem*, 6 W. R. 178.

There is not necessarily any error in law in trying the issue of limitation with the merits of the case. *Kasim Mundul v. Kedarnath Ghose*, 8 W. R. 364. But where it is possible to separate the issues of limitation and title, they should be tried separately and not mixed up to-

gether. *Woodin v. Umbica Soondurce Dossee*, 3 W. R. 226. It is incorrect to hold that when a case is decided on the issue of limitation, the Court cannot go into the merits. On the contrary, it may be convenient that that course should be followed, since in the event of an appeal, if the plea of limitation be set aside, the case may at once be heard by the appellate Court upon the merits. *Shibo Doorga Chowdhraïn v. Syud Hossain Ali Chowdhry*, 6 W. R. 218.

Where a Judge found that a plaintiff's suit for the recovery of property was barred by limitation, but at the same time declared him to be the rightful owner of the property in dispute; it was held by the High Court that these two opinions were contradictory, and that the Judge should have dismissed the suit with all costs. *Ram Kishore Dutt v. Radha Gobind Roy*, 11 W. R. 139.

Where in a suit for possession, the plea of limitation is taken in bar, the question whether that issue should be decided before or after the merits of the case are tried, must depend on the peculiar circumstances of each case: there is no law or legal practice enjoining that in all cases a plea of limitation must be decided before the merits of the case can be approached. *Ruttun Monee Dabea v. Doorgaram Soorma Chuckerbutty*, 4 W. R. 61. It has been held, however, that where, in a suit for possession, a defendant who is in possession under the order of a competent Court, pleads limitation, he is entitled to a clear finding on that issue before the question of title is enquired into. *Narain Acharj Chowdhry v. Tarinee Kishore Acharj Chowdhry*, W. R. 1864, p. 142. Where the merits of the case are found to be wholly against the plaintiff, it is not necessary that the Court should pronounce on a plea of limitation. *Rajendro Kishore Singh v. Roy Goodhur Sahary*, W. R. 1864, p. 247.

A sued to recover lands from which he alleged that he had been ousted by B. C intervened, representing that

she had purchased A's rights under a deed of sale. The Moonsiff found the purchase proved, and dismissed A's suit, but the Principal Sudder Ameen, holding that C's purchase was not proved, reversed this decision. On special appeal, C urged that a plea of limitation which she had put forward in the lower appellate Court, had not been enquired into. It was held that the plea of limitation did not arise on the record as between A and B; and that as C's interest in the case fell when her purchase was found not to be proved, the plea of limitation fell with it. *Shibnarain Bhattacharjee v. Shoshee Mookhee Dossee*, 1 Hay, 255.

In a suit to establish the right to landed property, and to recover arrears of rent, no specific acts of ownership for a period of upwards of twelve years were alleged in the plaint, which contained, however, a statement general enough to let in evidence of such acts. It was held by the Madras High Court that as it did not appear that the plaintiff had been questioned, the plaint should not have been rejected by the lower Court, under Section 32, Act VIII of 1859, on the ground that the plaintiff's right of action was barred by length of time. *Udaya Varma v. Nayar Chambilhu*, 1 Mad. 322. In this case it was observed, that while, on the one hand, the power conferred on the Court under the Section referred to of considering at the outset whether limitation bars the claim, may have the effect of preventing objectionable litigation, and saving expense; on the other hand, unless it be carefully exercised, the Judge may, upon mere partial preliminary statements, form an *ex-parte* opinion not warranted by a full knowledge of the facts.

In the case of *Chetti Gaundan v. Sundaram Pillai*, 2 Mad. 51, it was held by the Madras High Court, that, although a plaint has been registered, the Court may reject it, under Section 32 of Act VIII of 1859, as barred by limitation; since it would be contrary to the plain intent

of the Civil Procedure Code to hold that the mere ministerial act of registration deprives the Court of the power designedly given, of itself taking notice of the rule of limitation.

It was formerly held that where one of two Judges sitting as an appellate Court, agrees with the lower Court in considering that a plaintiff's evidence is insufficient to bring his case within the period of limitation prescribed by law, the determination is final under Section 23, Act XXIII of 1861. *Gopee Kissen Gossain v. Brindabun Chunder Sirkar Choudhry*, 2 W. R. 221. But under Section 36 of the Letters Patent for the Calcutta High Court, the opinion of the senior of the two Judges will now prevail, whether it be in accordance with the decision of the lower Court, or not.

In calculating the period of limitation within which a suit must be brought, it has been held that the day on which the cause of action arose, should be included in the computation, *Hurro Soonduree Dabea v. Kally Mohun*, 1 Hay, 301. In this case, reference was made to the case of *Brijo Kishore Dhur v. Mudhoosoodun Roy*, S. D. 1859, p. 1232, in which the plaintiff sued to reverse a sale which had taken place on the 3rd January, 1845. The plaint was registered as filed on the 3rd January, 1857. The Court of first instance dismissed the claim as barred by limitation. But the lower appellate Court considering it very probable that the plaint had really been filed on the 2nd January, and that the amlah of the Court had neglected to note that it was filed on that day, held that the suit was in time. A special appeal having been admitted in order to try whether the day of sale itself should be included in reckoning the period of limitation,—with reference to the recognized principle that in calculating the period for appeals, the day on which the order appealed from was passed, is not to be included,—it was held by the Sudder Court that the day of sale should

be included in computing the period of limitation, since the act of sale gave the plaintiff his cause of action and limitation runs from the date of such act. It was further observed that the surmise of the lower appellate Court, that although the plaint was registered as having been filed on the 3rd January, it might really have been filed on the 2nd, was altogether inadmissible. Compare the case of *Monikurnika Chowdhraïn v. Kali Chunder Chowdhry*, W. R. 1864, p. 149. But a contrary view has been followed in more recent decisions. In the case of *Rumonee Soonduree Dossee v. Panchanun Bose*, 4 W. R. 105, it was held that in computing the period within which a suit to contest the justice of a survey award should be brought under Clause 6, Section 1 of Act XIV of 1859, the day on which the award was passed should be excluded. Section 77, Act X of 1859, provides that if in actions for rent a third party appears as claimant, his claim shall be enquired into by the Collector, and the suit decided according to the result of that enquiry, but that "the decision of the Collector shall not affect the right of either party who may have a legal title to the rent to establish his title by suit in the Civil Court if instituted within one year from the date of the decision." A plaintiff having instituted a suit of the above nature within a year from the date of a Collector's decision—if in computing the time, the date of the decision was excluded,—it was held that the true construction of the words above cited, is that the date or day on which the Collector pronounced his decision being excluded, a full year reckoned from the end of that day is given for the institution of a suit in the Civil Court, and that consequently the plaintiff's suit was in time. *Bungshee Mohun Doss v. Radha Monee Chowdhraïn*, 4 W. R. x. 30. So, also it has been held that the day on which an order under Section 246, Act VIII of 1859, has been pronounced, is not to be reckoned

within the time allowed by that Section for bringing a regular suit. *Kuroona Moyce Dabea v. Petumber Shaha*, W. R. 1864, p. 321.

Some uncertainty has been felt as to the rule to be followed when a period of limitation expires at a time when the Courts are closed. Under the old law of limitation,—Section 14, Regulation III of 1793,—it was held by the Agra Sudder Court that proceedings not instituted before the expiry of the period of limitation cannot be instituted afterwards, even although the last day of such period may have fallen during the Dusserah, or other *authorized* vacation; but that if the period shall have expired on a day on which the Court is unauthorizably and unexpectedly shut, as, in one instance, on account of the death of a near relative of the Judge, the suit will be admissible on the re-opening of the Court, since the closing of the Court on such an occasion, without legal authority, or public announcement, is a contingency against which the suitor cannot be expected to provide. *Macpherson on Mortgages*, 5th ed. p. 161. A less strict construction of the old law was adopted by the late Bengal Sudder Court in the case of *Kaleecoomar Roy v. Syed Nuzeer Ahmed Hosseince Chowdhry*, S. D. 1858, p. 1778, in which the defendant having pleaded limitation by reason that the plaintiff's suit was brought some days beyond the period of twelve years from the time when his cause of action arose, it was held that, as the last day of the twelve years was a close holiday, and the plaint was presented on the first open Court day, the suit was within time. This decision, however, could only be supported by giving the widest construction to the provision of Section 14, Regulation III of 1793, by which the inability of the plaintiff from any good and sufficient cause to obtain redress, is made a ground for extending the period of limitation, and as no such latitude of exemption is provided under Act XIV of 1859, the decision cannot be

taken as a precedent in cases arising under that Act. As such, however, it would seem to have been accepted in various cases decided by the Calcutta High Court. Thus, in the cases of *Kanye Deyce v. Bipro Pershad Mytee*, 1 W. R. 341, and *Monikurnika Chowdhraïn v. Kali Chunder Chowdhry*, W. R. 1864, p. 149, it was held that when the day on which the period of limitation expired was a close holiday, and the plaint was filed on the subsequent day, such filing was in time. Similarly, in the case of *Maneerun v. Lateefun*, 3 W. R. 46, it was decided that when the period of limitation expires at a time when the Courts are closed, it is sufficient if the suit be instituted on the first open Court-day.

But the ruling of the Full Bench in the case of *Rajkisto Roy v. Denobundhoo Surmah*, 3 W. R. s. c. 5, definitively establishes that where a period has been fixed under Act XIV of 1859, within which a suit must be brought, the Court has no discretion to extend the period so fixed by the Act, on the ground that it expires on a day when the Court is closed. Compare *Tarinee Churn Singh v. Collis*, 3 W. R. 209; *Mihee Ram Gogooee v. Hoolee Ram Doss*, 6 W. R. 40; *Ramasamy Chetty v. Venkatachellapaty Chetty*, 2 Mad. 468. A suit was brought on the 4th January, 1862, which, under Act XIV of 1859,—finally coming into operation upon the 1st January, 1862,—was beyond the period prescribed for the institution of such a suit. The Court in which the suit was brought held that it was not barred, inasmuch as the Civil Judge of the district, in order to meet the inconvenience of an unexpected adjournment of the Courts for the Christmas holidays, had directed that all suits filed on the 4th January, 1862, should be treated as if brought under the old law. On appeal it was held by the Madras High Court that the Civil Judge had no power to make such an order, and that the Act must be applied. It was observed that no sort of equitable con-

struction can be put on a Statute of Limitation, and that on the authority of the English cases, it would seem that even if the Courts of Justice were shut up in time of war, so that no suit could be brought, limitation would not the less continue to run. *Subbarajulu Nayanivaru v. Venkataraya Chetty*, 2 Mad. 268. From these observations it might appear to follow, that when a suit is prevented from being filed in time, owing to the unexpected closing of the Court upon the last day of a period of limitation, it must be held to be barred. But a contrary opinion was expressed by the Calcutta High Court in the case of *Rajah Bishen Perakash Narian Singh v. Babooa Misser*, 8 W. R. 73, in which it was decided that where, upon the last day for instituting a suit, the Court happened to be unexpectedly closed to suit the convenience of the Judge, the day not being an authorized holiday, the plaintiff was not barred by limitation, by reason that his plaint was not filed on that day, if he could prove that he was ready to file it on that day, and did actually file it on the first open Court day thereafter.

Under Section 230, Act VIII of 1859, it is provided that if any person other than the defendant shall be dispossessed of immoveable property, and shall desire to dispute the right of the decree-holder to dispossess him, he may apply to the Court within one month from the date of such dispossession. It has been held that no discretion is given to a Civil Court to extend this period, on the ground that throughout the whole of it the Court has been closed and the Judge absent. *Deewan Ali v. Munsoor Ali*, 11 W. R. 259.

It may be useful here to notice the periods fixed for the presentment of applications for appeal and for review of judgment. As respects the presentment of *regular* appeals, the procedure is now regulated by Section 333, Act VIII of 1859, which directs that such appeals are to be presented within thirty days, if the appeal be to a

District Court, and within ninety days if the appeal be to the High Court, unless the appellant shall shew, to the satisfaction of the appellate Court, sufficient cause for not having presented it within such period. The Section further provides that the days shall be reckoned from, and exclusive of the day on which judgment was pronounced, and also of such time as may be required for obtaining a copy of the decree appealed against. Under Section 373 of the same Act, a period of ninety days is prescribed for the presentment to the High Court of applications for the admission of *special* appeals. The language of these two Sections is different, in so far as the latter contains no express provision for an extension of the period for presentment on sufficient cause being shewn to the appellate Court. With reference to this difference in the terms of the two Sections, it was observed by the Agra High Court in the case of *Syud Kootub Hossein v. Florest*, 1 Agra, F. B. 100 :—" If we read the words 'period prescribed' in Section 373, as referring only to that portion of Section 333 which gives a specific and limited period, and not as also including the sentence which provides for the extension of the time, we introduce a diversity of rule as to the time of appeal, which the Code scarcely seems to contemplate. We think it consistent with the terms of the law to adopt the construction which will give to all appellants the same period for preferring their appeals whether regular or special. We therefore hold that in computing the period under Section 373, the same rule must be followed as in computing the period under Section 333, in other words, that on cause being shewn to the Court's satisfaction, the specified period may be extended." It appears from the report of this case that a contrary rule of interpretation had previously been followed by the Agra Sudder Court.

Under Section 377 of Act VIII of 1859, application may

be made to any Court for a review of its judgment within ninety days from the date of such judgment. But the time may be extended on just and reasonable cause being shewn.

Under Rule 38, formerly Rule 34, of the Calcutta High Court Rules, it is provided that appeals from decrees, or appealable orders passed by a Judge or Division Court of the High Court, in the exercise of ordinary Civil jurisdiction, shall be presented within twenty days from the date of such decrees, and within four days from the date of such orders, in reckoning which time the date of the decree or order shall be excluded. The time thus allowed may be extended on cause being shewn.

The following cases will illustrate the operation of the above provisions. The mere adding to a decree an order that it shall bear interest from its date, is not an act done by way of review, and an application for such an order is not governed by the limitation prescribed by Section 377, Act VIII of 1859. *Syedun v. Zuhoor Hossein*, 11 W. R. 141. When the last day on which an appeal should be filed falls on a Sunday or other close holiday, the appellant is entitled to have an extra day allowed him. *Rajkisto Roy v. Denobundhoo Surmah*, 3 W. R. s. c. 5. Similarly, when after deducting the time occupied in procuring a copy of the order appealed from, the period within which an appeal should be brought expires on a Sunday, the practice is to receive the application for appeal on the following day. *Gopeenath Chatterjee v. Gopeenath Roy*, 6 W. R. MIS. 106. The time which intervenes between the putting in stamps and obtaining a copy of the decree appealed from, should be deducted in computing the period for the presentment of an appeal, *Lal Gopalnath Sahee Deo v. Pudun Kooncur*, 5 W. R. MIS. 44; and in the time to be thus deducted, the day on which the stamped paper was deposited, and the day on which the copy of the decree was supplied should both be included. *Beer Chunder Joobraj v. Maho-*

med Asgur. W. R. 1864, p. 145. The rule contained in Circular Order No. 31 of the 3rd October, 1864, that the time allowed for obtaining a copy of the decree shall not begin to count until the whole of the requisite pieces of stamp paper are put in, has been held to apply also to the case of plain paper furnished under the general rule at the end of Schedule B. Act X of 1862, when the copy of the decree cannot be conveniently comprised within the stamp paper put in. *Chumun Chowdhry v. Shaikh Ali Azim*, 9 W. R. 138.

Where the ninety days allowed under Section 373, Act VIII of 1859, for presenting a petition for special appeal to the High Court had expired during the Dusserah vacation, when the Court was closed, and the appeal was not presented until three days after the opening of the Court, the Court refused to admit the appeal. It was observed that vacations are not periods to be added to the prescribed time for appealing, but are only periods during which the presentation of appeals is excused on the ground of impossibility, and that parties should therefore be ready to present their appeals immediately on the opening of the Court. *Kistoprosad Chuckerbutty v. Radhakanto Bhutta-charjee*, W. R. MIS. 1864, p. 13.*

Where the ninety days allowed under Section 377, Act VIII of 1859, for presenting a petition for review expired during the Dusserah vacation, and the petition was filed on the first open Court day after the holidays, it was held that the petition was practically within the time allowed by law, "since the holidays were to be reckoned as *dies non*." *Woola Gochur v. Shah Rukh Begum*, 6 W. R. 19. This decision seems, however, to go too far in declar-

* Compare *Lakhmidas Hauz-raj*, 5 Bombay, o. c. 63, as to the time for appealing under Section 73, of the Insolvent Debtor's Act. (11 and 12 Vic., c. 21). It has been held that a Commissioner

has no power under that Section to extend the time for presenting a petition of appeal from an order of the Insolvent Court. *Ghulam Rasool Khan*, 1 Ben. o. c. 130.

ing that holidays shall be regarded as *dies non*. The more correct view of the matter is that expressed in the case last cited, *vis.*, that holidays are days on which the presentment of petitions for appeal, or review, is excused. If holidays were to be regarded as *dies non*, they would have to be deducted in computing the period for review or appeal in all cases in which they fall within the time for appealing, and not in those only in which the last day of the period happens to fall within them.

Where an appeal is presented beyond the fixed period, it is in the discretion of the Court to pronounce whether sufficient cause has been shewn for the delay in presenting it. *Mahomed Wais v. Rajkoomar Roy*, 7 W. R. 337.

An order having been passed by the Judge of a Zillah Court for execution of a decree, the judgment-debtor instituted a regular suit to set the order aside. Failing in this suit, more than two years from the date of the order, he applied to the High Court for leave to bring a special appeal. But the Court was of opinion that, as the applicant had elected the remedy of a regular suit, he could not, when that had failed, be allowed to file a special appeal out of time. *Kalikishore Sein v. Nilambur Sein*, 2 W. R. MIS. 35.

In the case of *Oogur Narain Singh v. Joogul Kishore Singh*, 8 W. R. 483, an application for review made more than fifteen years from the date of the original decree, was held to be admissible. Reference was made in this case to various decisions of the late Sudder Court, in which the question as to the time within which such applications could be made, was discussed. The Court was, however, of opinion that as these cases were decided upon the law as it stood before the year 1859, the question was under Act VIII and Act XIV of 1859, still *res integra*. It was observed by L. S. JACKSON, J.:—"The Limitation Act XIV of 1859 is wholly silent on the subject, and Section 377, Act VIII, assigns no limit to the time after the expiry of

ninety days, at which the application for review may be filed, provided that the applicant can satisfy the Court that there was just and reasonable cause for the delay. In the present instance, cause was shewn for the delay. The Judge took evidence as to its truth, and after full consideration decided that cause had been made out. He therefore granted the review, and his order on that point is final and cannot be disturbed, unless shewn to be contrary to law or usage having the force of law. Can we say that there is any law, or usage having equal force, which declares that an application for review must be made within twelve years? I know of none: and I do not apprehend it to be the duty of Courts to impose limits in such matters which have not been set by the Legislature."

It has been held, however, by a Full Bench, that an appeal will lie from the order of a lower Court deciding what is just and reasonable cause for admitting an application for review after the prescribed period of ninety days has elapsed; and that an appellate Court has power to look at the reasonableness or sufficiency of the cause assigned for admitting such review. *Brindabun Chunder Roy v. Shamachurn Chuckerbutty*, 9 W. R. 181; *Gonomoonce Dossee v. Gunganarain Roy*, 8 W. R. 184. It was decided in these cases that where a review has been granted beyond the ninety days required by law, without just and reasonable cause, the review and all done under it must fall to the ground. So, where an application for leave to sue as a pauper was rejected as barred by limitation, and an application for review of the judgment refusing leave was granted, and the pauper plaintiff's suit decreed, it was held by the High Court on appeal, that as the application for review had not been made within ninety days from the order to which it referred, and no just and reasonable cause had been shewn for the delay, the application ought not to have been entertained, and that the Court's decision

in the case, was 'without jurisdiction.' *Doollub Beebee v. Mahomed Gazee Chowdhry*, 11 W. R. 22.

A new exposition of the law by the High Court, is not a just and reasonable cause for admitting an application for review of judgment, after the period of ninety days has expired. The new construction of the law may be a ground for review, but it is no ground for delay in applying for review. *Ekkowree Singh v. Onoop Chunder Paul*, 6 W. R. 167; *Dwarkanath Doss Biswas v. Manick Chunder Doss*, 9 W. R. 102. But when a review has been properly granted, the determination of the case should be governed by any new exposition of the law which may have been laid down since the date of the decision under review. *Bindabun Chunder Roy v. Shamachurn Chuckerbutty*, 9 W. R. 181; *Prankissen Bhuttacharjee v. Bukshee Cazee*, 10 W. R. 26.

With reference to the provisions of Sections 333 and 377, Act VIII of 1859, it was held by the late Sudder Court of Madras in a case decided on the 1st October, 1860, that if a party present an application for review of judgment within the time limited for appealing from the decree, the period occupied by the Court in disposing of such application will not be reckoned among the number of days limited by the Act for appealing, but will be added thereto, and a memorandum of appeal presented within such extended period, will be received as put in within time.

In the case of *Nobokissen Singh v. Kameenee Dossee*, 2 W. R. MIS. 35, a decree having been passed by a Judge of the Calcutta High Court, sitting as a Court of ordinary Civil jurisdiction, on the 15th February, 1864, thirty days were, under Rule 34—now Rule 38—of the Rules of the High Court, given the plaintiff within which to appeal or to apply for a review of judgment. On the 8th March, the plaintiff filed a petition for review, which, however, was not heard until the 23rd December, when

it was rejected. Nineteen days after, the plaintiff presented a petition of appeal. A reference having been made for the opinion of a Full Bench as to whether the period of appeal should not be reckoned from the date of the order rejecting the application for review, instead of from the date of the original judgment,—or at any rate, whether the period during which the application for review was pending, should not be deducted from the period allowed for appeal,—the Court held that even after deducting the time during which the petition for review was pending, the petition for appeal was not presented in proper time; and that as the mere fact of a review having been applied for, was no ground for delay after its rejection, the plaintiff should have presented his petition of appeal immediately after the rejection of the petition for review. In this case the Court expressed an opinion that the rule laid down in the decision of the Madras Sudder Court was a correct one. As, however, the case was not decided under the provisions of Act VIII of 1859, but under those of a special rule of the Court, and as, moreover, the decision of the case did not turn upon the question whether the time occupied in disposing of the review should be excluded in computing the period for appealing, that period being held to have expired whether the time occupied in disposing of the review were excluded or not, this opinion of the Court was in fact no more than an *obiter dictum*, and is so spoken of in the more recent case of *Brojender Coomar Roy Chowdhry*, 7 W. R. 529. In the latter case judgment having been given against a defendant on the 31st August, 1866, he presented an application for review on the 2nd October of that year,* which application was finally rejected on the 12th January, 1867. Sixty-three days after the time when

* Five days had been consumed in obtaining a copy of the judgment of which a review was sought.

the petition of review was rejected, the defendant submitted to the High Court a petition for leave to bring a special appeal. The Division Court in which the application was made, being of opinion that it might not in all cases be necessary or reasonable to allow the full period for appeal in addition to the time during which an application for review had been pending, referred the matter for the consideration of a Full Bench. On this reference it was decided that the ruling of the Court in the case last cited must be upheld. It was observed that "although it was a mere *dictum* of the Court in that case that the decision of the Madras Sudder Court was right, still it ought not to be interfered with. The Court had merely followed a practice which had been adopted in Madras from the year 1860, and as parties had probably been acting upon the ruling of the Court, it was too late to reverse it, as great inconvenience might be caused by so doing."

The rule which directs that the time required for obtaining a copy of the decree, shall be excluded in computing the period within which an appeal must be brought, does not apply to appeals from judgments of the High Court sitting as a Court of original civil jurisdiction. *Elias v. Habool Mooshee Mooshee*, 1 Ind. Jur. n. s. 18. In this case, the Court having refused an application for appeal upon the ground that it had been made more than twenty days after the date of the judgment sought to be appealed from, it was contended that the time taken by the Court in furnishing the appellant with a copy of the judgment was not to be included in reckoning the twenty days, and various cases decided by the Court on the appellate side were cited to this effect. The Court observed:—"The practice in the other branch of this Court is to give written judgments. Here, the judgment is delivered orally by the Judge in the presence of Counsel, whose duty it is to hear and note down the same. To these

notes the parties, or their solicitors can immediately refer, and instruct Counsel to prepare a memorandum of appeal. No time can therefore be reasonably deducted under colour of taking an office-copy of the judgment."

It has been held by a majority of a Bench of three Judges, PEACOCK, C. J. and KEMP, J.,—GLOVER, J. dissenting,—that an appellate Court after admitting and registering an appeal, has no power at the hearing to reject it upon the ground that it was not presented within the prescribed period. *Issur Chunder Sirkar v. Bharut Chunder Roy*, 8 W. R. 141. The point, however, may be thought open to doubt. *Mouree Bewah v. Soorundarnath Roy*, 10 W. R. 178.

A petition of appeal had been accepted and registered in a Zillah Court. Several months after when the case came on for trial, the Judge, discovering certain deficiencies and a want of precision in the petition, rejected it under Section 336, Act VIII of 1859. The High Court held that this procedure was irregular, since it was the duty of the Judge, either himself, or through his officers, to have examined the petition on its presentation, and to have rejected it, if necessary, before registering it, at a time when the petitioner would have had the opportunity of correcting it, or of filing a fresh one. It was observed that it was not contemplated by the law that a petition of appeal should be rejected on such grounds as those stated by the Judge, without adjudication, at a late stage of the proceedings, and when the time for filing an amended or fresh appeal had passed. *Gopee Bullub Roy v. Goluck Proshad Bose*, W. R. 1864, p. 135.

Under Rule No. 1 of the Privy Council Rules of the 10th April, 1838, the High Court has no power to allow an appeal to Her Majesty in Council when the petition is not presented within six calendar months from the date of the decree complained of. *Tamvaco v. Skinner*, 1 Ben. o. c. 39. It was observed in this case that while the

provisions of Section 333 of Act VIII of 1859, regulating the admission of appeals in the Civil Courts of this country, expressly allow of exceptions, the terms of the Privy Council Rule are imperative and give no discretion. It has, however, been held by a Bench of five Judges, that it is discretionary with the High Court to *restore* an appeal to the Privy Council which, having been once admitted, has been dismissed for default, or for any reason removed from the file of the Court, notwithstanding that the six months allowed for appealing may have expired. *Radha Binode Misser v. Kripa Moyee Debea*, 7 W. R. 531.

A suit is to be considered as instituted from the day on which the plaint is presented, and not from the day on which it is registered. *Jugobundhoo Dutt v. Maseyk*, W. R. 1864, p. 81; *Gour Monee Dossee v. Jugobundhoo Bose*, 3 W. R. 1; *Mozhur Hossein v. Ramchurn Bhukut*, reported in the "Englishman" of the 14th June, 1864.

Where a plaint was filed within the prescribed period of limitation, and the Judge instead of registering it, took time to enquire whether the stamp on a deed of conveyance filed with the plaint was sufficient, and the plaint was in consequence not registered until after the period of limitation had expired, it was held that the suit must be taken to have been instituted on the day when the plaint was filed, and not on the day on which it was registered. *Hurry Pershad Singh v. Syud Irtaza Hossein*, 7 W. R. 241.

Where, owing to some difficulty in procuring stamped paper, a plaint was presented to the Clerk of a Small Cause Court at his private residence, after the usual office hours on the last day of the period of limitation, and the Clerk refused to receive it, it was held on a reference to the High Court that, under the circumstances, the plaint must be considered to have been submitted to the proper officer of the Court within the period allowed by the law of limitation. *Muddun*

Mohun Chuckerbutty v. Tabeer Biswas, Mof. S. C. Ct. Ref. p. 36. The circumstances which prevented the plaintiff from procuring stamped paper in due time do not appear from the report of the case, and in other respects the correctness of the decision may seem open to doubt.

Where a plaint filed two days before the expiry of the period of limitation, was found to be insufficiently stamped, and was returned to have the proper stamp affixed, it was held that the plaintiff could be allowed only two days from the date of the order for the return of the plaint, for filing a fresh plaint on a proper stamp. *Nund Doolal Sirkar v. Dwarkanath Biswas*, 2 W. R. 9. A plaint having been returned as not duly verified, was not again presented for registration until more than six months after the period of limitation applicable to the suit had expired. It was held that the order of the lower Court refusing to receive it was under the circumstances a proper order, and that if the plaintiff intended to appeal against the original order returning the plaint for verification, he should have appealed at the time when that order was passed. *Aboo Beebee v. The Collector of Jessore*, 4 W. R. 81. But in another case in which a plaint filed seven days before the expiry of the period of limitation was, after the period had expired, returned as not duly verified, and was not again presented until twenty-six days from the date of the order returning it, the Court held that the date of the institution of the suit must be taken to be that of the original filing of the plaint, and consequently that the suit was in time. *Aboo Mahomed Abdool Khader v. Husrutoollah*, 6 W. R. 39. A plaint was returned, as not containing the particulars required by Section 26, Act VIII of 1859, for amendment, and was accordingly amended by filing a supplemental plaint together with the original plaint two days after. It was held that the date of first filing the original plaint, should,

in computing limitation, be taken to be the date of instituting the suit. *Shamchand Koondoo v. Kalikant Roy*, 2 Hay, 314; *Dwarkanath Hazra v. Ramkoomar Shaha*, 5 W. R. 207; *Prankissen Bhuttacharjee v. Grishchunder Singh*, 7 W. R. 157. A plaint presented two days before the expiry of the prescribed period of limitation was returned for amendment, but no time was fixed within which the amendment should be made. The amended plaint having been reproduced and filed some days beyond the period of limitation, the defendant pleaded that the suit was barred. But it was held by the Madras High Court that the date of the original presentment of the plaint was to be taken to be the date of commencing the suit. It was observed that the order of return for amendment was not to be read as if it had contained the words "you must produce the amended plaint within the two days still remaining of the period of limitation," but as if it had said "you shall have a reasonable time for amending." *Ismail Sahib v. Arumuga Chetti*, 1 Mad. 427.

In computing limitation in a case in which the plaintiff sues as a pauper, the commencement of the suit is to be reckoned from the day when the application to sue *in formâ pauperis* is filed, and not merely from the day when it is allowed. *Sectaram Gour v. Golucknath Dutt*, 1 Hay, 378; *Kanye Deyee v. Bipro Pershad Mytee*, 1 W. R. 341. In the former case PEACOCK, C. J. observed:—"Under Section 308, of Act VIII of 1859, the application to sue *in formâ pauperis*, if allowed, is to be deemed a plaint. The application in the present case was admitted. It therefore became a plaint, and it must certainly be taken to have been filed on that day on which it was presented as an application. If this were not so, cases in which the period of limitation is one year, might be barred while the Judge is considering whether the application to sue *in formâ pauperis* ought to be admitted. In this very case,

the application was not admitted until more 'than one year after it was presented." See also *Vinayak Dharle v. Bhau Samrat*, 4 Bom. A. C. 39. Under the old procedure, it would seem that no allowance was made for the time during which the application for leave to sue as a pauper was pending. *Macpherson's Civil Procedure*, 4th ed. p. 84. Compare *Naragunty Lutchmeedaramah v. Vengama Naidoo*, 9 Moore's I. A. 66.

A party who applies to a Court to realize a claim against a company which is being wound up by the Court, is to be considered as "prosecuting a suit" within the meaning of this Section; and his suit will be taken to commence from the date on which he first sends in his claim to the official liquidator. *Robertson's case*, 2 Ind. Jur. N. S. 180.

Some uncertainty will be found in the decisions, as to the manner in which limitation should be applied in cases in which a new plaintiff or defendant has been substituted or added after the institution of a suit, under Section 73, Act VIII of 1859. In the case of *Kalikishore Chatterjee v. Luckhee Chowdhraïn*, 6 W. R. 172, it was held that where a person is admitted as a co-plaintiff under the Section referred to, limitation should be reckoned against him, not up to the date when he was admitted as a party to the suit, but only to the date when the original plaint was filed. But in the earlier case of *Kissen Loll Chowdhry v. Chunder Coomar Roy*, W. R. 1864, p. 152, a contrary and apparently a sounder view was taken. It was observed in this case that in common justice no person ought under the Section cited, to be added as a plaintiff, whose right of action is barred by limitation; and that there is no principle on which it can be contended that the institution of a suit by a wrong party should operate to keep alive the rights of one who by his delay has brought himself within the provisions of the Limitation Act.

In the case of *Issur Persad v. Oorjoon Lall*, 2 Hyde, 248, the plaintiff sued for the price of goods sold in May, 1861, filing his plaint in April, 1864. The names of six defendants appeared in the plaint. In July, 1864, leave was asked and given to add the name of a seventh defendant as a party. On behalf of the defendant thus added, it was contended that, as against him, the suit was barred by limitation; but the Court held that as the suit had been begun before the expiry of the period of limitation, it was not barred even as against the defendant subsequently added. The correctness of this decision may, however, be doubted. As against the seventh defendant, the suit may more reasonably be taken to have commenced when his name was inserted in the plaint, and there seems to be no warrant for allowing such insertion to have retrospective effect. If the plaintiff had failed in his suit against the six defendants, whose names originally appeared in the plaint, and had then brought a fresh action against the seventh, he could not, under the provisions of Section 14 of the Act, have been allowed in computing limitation to deduct the time during which he had been suing wrong parties on the same cause of action; and it would seem equally unreasonable to permit him to join a defendant in whose favour limitation had run, with the other defendants as against whom the suit had been commenced in time. The views above indicated, would seem to have suggested themselves to the mind of the Court in the case of *Rajkissoree Dossee v. Buddun Chunder Shaha*, 6 W. R. 298, in which it was held that where a person is substituted or added as a defendant under Section 73, Act VIII of 1859, the suit must be taken to have commenced as against him at the time he was made a defendant and not before. Compare *Janokeeram Chuckerbutty v. Nundo Gopal Roy*, W. R. 1864, p. 316.

But where during the pendency of a suit, the defendant dies, and the suit is continued against his heirs, it will

be considered to have been commenced as against them from the date when it was instituted against the original defendant. *Sreekissen Chowdhry v. Ramkisto Bhutta-charjee*, 10 W. R. 317.

The period of limitation is to be computed from the time when the cause of action has arisen. In a suit to set aside a deed, it has been held that the cause of action arises when the deed is executed. *Jeonath Bhukut v. Roopa Kooncur*, 2 W. R. 273. There are many cases, however, to which this rule will not apply. An action will not lie to declare the forgery of a deed which has not been issued or attempted to be enforced. *Kissen Kanth Acharjee v. Bhyrub Chunder Mozoomdar*, S. D. 1853, p. 943. But the registry of a deed of sale is a valid cause of action to a plaintiff who being the ostensible grantor of the deed sues to set it aside as forged. *Shakir Mahomed*, S. D. 1857, p. 208. In this case the Court observed:—"It appears to us that the registry of the deed, is a substantial issuing thereof; and that the right and advantage created by the law of registry, constitute a very sufficient ground for the institution of an action, when parties aver that a deed purporting to have been executed by them was not so executed."

In a suit for possession after dispossession under a *soleenamah*, or deed of compromise, inimical to the plaintiff's interests, executed during the plaintiff's minority by his guardian, it was held that the plaintiff's cause of action might be taken to have arisen from the date of his dispossession, and not from the date on which the *soleenamah* was executed, or from the date on which the plaintiff became aware of its existence. In such a case, the Court was of opinion that the series of acts which injured the plaintiff, must be considered to be his cause of action, and not the first of them only in point of time, since the existence of the *soleenamah* so long as it was not acted upon, and so long as the plaintiff remained in possession, could not materially affect him. It was only

when the *soleenamah* was acted upon, and the plaintiff dispossessed under it, that it became necessary for him to have recourse to the Court. *Rutnessur Paul Chowdhry v. Dhunnunjoy Shikdar*, 6 W. R. 18.

The guardian of certain minors having mortgaged lands belonging to them, and put the mortgagee in possession, afterwards sold the estate out and out to the mortgagee. On a suit being brought by the minors to set aside the sale as not binding upon them, it was held by the Agra High Court that a separate and distinct cause of action accrued on the sale, and that limitation was not to be reckoned from the date of the mortgage. The Court observed:—"Assuming that the plaintiffs' right to contest the mortgage be lost by efflux of time, it is certain that their right to redeem the mortgage is not similarly lost. But the conversion of the mortgage into a sale is a direct invasion, which was conceived to resist their right to redeem the mortgage, and is a new cause of action admittedly within time." *Iradat Khan v. Debec Dyal*, 1 Agra, 180.

Where a contract is entered into for the payment of money at a certain future day, the cause of action accrues and limitation runs from the day so fixed, and not from the date of the contract. *Kissen Kinkur Ghose v. Borodukanth Roy*, 2 Hay, 656. But where money is lent under an agreement, that it shall be payable on demand, it has been held by the Madras High Court that the cause of action arises instantly on the loan being made, and that limitation runs from that date. *Hempammal v. Hanuman*, 2 Mad. 472.

In a promissory note bearing date as of a certain day in a Hindoo month, without mention of the corresponding English date, it was stipulated that payment should be made after four months. It was held by the Bombay High Court that the parties having referred only to a Hindoo date, must be presumed to have contracted with

reference to the Hindoo, and not the English calendar, and that limitation should be reckoned from the expiry of the four Hindoo months subsequent to the date when the note was made. *Gunpatrav bin Ramji v. Mannu bin Mohanji*, 5 Bom. A. C. 150.

Each instalment of a *kistibundee* as it accrues due, constitutes a fresh cause of action. *Enaetoollah Chowdhry v. Huro Chunder Da*, 2 W. R. 39. A plaintiff sued on a bond payable in seven annual instalments, and containing a condition that upon failure to pay any one instalment, the whole principal sum secured should immediately become due and recoverable with interest. The defendant who had failed to pay any one of the instalments, pleaded limitation on the ground that the suit was instituted more than six years after the time when the first instalment became due, and when by the terms of the bond, the plaintiff's right of action accrued for the whole sum secured. It was held by the lower Court that limitation only ran from the date at which the last instalment was made payable: but on reference to the High Court it was decided that by the terms of the bond, the plaintiff's cause of action was complete from the time when the defendant failed to pay the first instalment, and that his suit, not being within time reckoning from that date, was barred. The Court observed that the granting of further time for payment after the first default was quite an optional indulgence and forbearance on the part of the plaintiff. *Karuppanna Nayak v. Nallamma Nayak*, 1 Mad. 209. But compare the cases of *Hullodhur Bangal v. Hogg*, 1 W. R. 189; *Ramkrishna Mahadev v. Bayaji bin Santaji*, 5 Bom. A. C. 35; *Buldeen v. Golab Koonwur*, 1 Agra, F. B. 102; *Breen v. Balfour*, 1 Bourke, 120; *Hurronath Roy v. Maheroollah Moollah*, 7 W. R. 21.

In a suit to recover a balance of money advanced in payment of goods to be subsequently delivered, the cause of action will be taken to have accrued from the time at

which the delivery of the goods should have been given. If there was no express stipulation as to the time when delivery was to be given, and the time cannot be ascertained by reference to any usage of the trade, or to the course of dealing between the parties, a *reasonable* time from the date of the advance of the money should be allowed. *Boiddonath Shaha v. Lahunnissa Beebee*, 7 W. R. 164; *Satcowerree Singh v. Kristo Bangal*, 11 W. R. 529.

In the case of *Hills v. Allum Caze*, Mof. S. C. Ct. Ref. p. 45, the plaintiff sued the defendant for damages arising out of a breach of a contract to cultivate indigo during the season 1859-60, instituting his suit in April, 1863. It appeared that the defendant had in fact refused to cultivate in March, 1860, and that the plaintiff had thereupon proceeded against him before the Magistrate under Act XI of 1860, to enforce specific performance of the contract. On this evidence, the lower Court considering that the plaintiff's cause of action accrued from the date of the defendant's refusal to perform the contract, held the claim to be barred. But on a reference to the High Court it was said by PEACOCK, C. J., that under his contract to cultivate indigo for the season 1859-60, the defendant would have fulfilled the terms of his engagement, by sowing at any time before the expiry of the season for sowing in the year 1860, and that it was not alleged by the defendant, nor proved by the evidence that the season for sowing in that year expired before the end of April; that on the defendant's refusal to sow in March, it was optional for the plaintiff to treat such refusal as a breach, or not, but that the proceedings taken by him to enforce the execution of the contract showed that it was not his intention to treat the contract as broken; that the plaintiff not having elected to treat the contract as broken on the defendant's refusal in March, his cause of action did not arise until the time when that year's season for sowing was at an end, and it became impossible for the defendant to fulfil his agreement; and

that the suit having been instituted within three years from that time, was consequently not barred by limitation.

To the same effect in the case of *Smith v. Gopaul Shaikh*, Mof. S. C. Ct. Ref. p. 148, it was observed that "according to a rule of English Law, which may perhaps be fairly applied in this country, where a refusal to perform a contract can be proved by evidence which shows that one party has utterly renounced the contract, or has put it out of his own power to perform it, the injured party may, at his option, sue at once, or wait till the time when the act was to be done."

But in another case it was held that a suit cannot be maintained for the amount payable under a bond, before the time fixed therein for payment has arrived, upon the ground that the defendant has repudiated the bond and declared it to be forged. *Sujeewan Singh v. Rupal Singh*, 10 W. R. 351.

Where in a contract to cultivate indigo it was stipulated that a lump sum should be paid as liquidated damages in the first year in which a breach of the contract took place, it was held that a suit for damages for breach of the contract in two successive years, must be brought within three years from the first breach. *Forbes v. Mir Mahomed Kazem Chowdhry*, 5 W. R. 277. But where the contract sued on, in fact includes a series of contracts, each complete in itself, and stipulates a distinct time for the fulfilment of each, the breach of each one of the series of contracts, as it occurs, affords a distinct cause of action from which limitation is to be reckoned. *Forbes v. Mohee Sahoo*, 6 W. R. x. p. 61.

A plaintiff sued to recover the value of certain trees which had been growing on his land, and which he alleged that the defendant, while lessee of the said land, had cut down, contrary to the terms of the lease, and without his, the plaintiff's, leave or license. The defendant pleading limitation, it was held that the claim could

not be maintained, inasmuch as the cause of action had accrued more than six years before the suit was instituted. The Court observed: "As a general rule of law, it may be said that the time of limitation runs from the date when the contract is broken, and not from the time when the knowledge of the breach of the contract comes to the plaintiff, whether such breach be patent and discoverable, or whether it be concealed and undiscoverable. The case for the plaintiff is, that the defendant occupied land under a lease in which he contracted not to cut down trees, that in breach of that contract, he did cut down trees more than six years prior to the institution of the suit, that the lease expired within the six years, that the cause of action did not arise until the expiry of the lease, and that therefore this suit for damages will lie. But the date of the expiry of the lease does not affect the question. The cutting down trees was the cause of action, and we see no force, and do not concur in the argument that the fact of the defendant having contracted not to cut trees must be considered as equivalent to a covenant on his part to surrender the land with the trees standing when the lease expired. On the expiry of the lease, if not sooner, the plaintiff could, if he had chosen, have ascertained whether the trees had been cut or not, and if he really did not know until lately that the trees had been cut, he was certainly guilty of laches in not making enquiries respecting his property at an earlier period, and has no conceivable ground of complaint that he is not now entitled to recover." *Indoo Bhoosun Deb Roy v. Kenny*, Mof. S. C. Ct. Ref. p. 106.

A having obtained possession of certain garden lands in the year 1850, under a two years' lease from B, continued to occupy as a yearly tenant till 1860, when he was ejected in a suit brought against him by B. In 1864, A sued B on a clause in the lease which gave him a right to remove certain trees planted by him in the

said garden. It was held by the Bombay High Court that A's cause of action arose in 1860, when B took possession of the land together with the trees in execution of his decree in the ejectment suit. *Sayaji v. Umaji*, 3 Bom. A. C. 27.

On the 12th October, 1855, A accepted a bill of exchange at three months, drawn upon him by B in favour of C, which bill was subsequently endorsed to D, for whom it was discounted by E. At maturity the bill was dishonoured. In the year 1861, E sued D on the bill and obtained a decree. In 1864, D paid the amount decreed with costs, and thereafter sued A as acceptor of the bill, to recover the amount thereof paid by him. It was contended for A that the action was barred by limitation which began to run from the date of the dishonour of the bill which happened more than three years before the institution of the plaintiff's suit. For the plaintiff it was urged on the authority of the English cases *Reynolds v. Doyle*, 1 M. & Gr. 753, and *Collinge v. Heywood*, 9 Ad. & E. 633, that as the effect of endorsing a bill is only a conditional contract on the part of the endorser to pay if the acceptor does not, the endorser is to be regarded merely as a surety, against whom limitation runs, not from the time of the default of his principal on the dishonour of the bill, but from the time when he may himself have been compelled to make payment: and that in this view, D's suit was in time, since his cause of action did not arise until payment was made by him. The Court, however, held, and the decision was confirmed on appeal, that the plaintiff's cause of action must be taken to have arisen on the dishonour of the bill, and that limitation should be reckoned from that time. *Mohendrolall Bose v. Judubkissen Singh*, 1 Bourke, 157.

A zemindar suing the co-sharers in a joint *ijara* for rent, obtained a decree. To save the property from sale in

execution, one of the co-sharers paid the whole amount decreed, and subsequently sued his co-sharers for reimbursement of the sum so paid by him over and above his own share. It was held that his cause of action accrued from the date of his payment to the zemindar and not from the date of the zemindar's decree. *Gourmonee Dossee v. Boykanth Nath Saha*, 2 W. R. 159. To prevent the sale of a joint-estate for arrears of Government revenue, A, one of the co-sharers, borrowed money from B, and paid up the arrears. In a suit by A against his co-sharers for reimbursement, it was held that his cause of action arose when he paid the money to the Collector, and not from the date when B from whom he had borrowed it, enforced its repayment under a decree of Court. *Kali Shunkur Sandyal v. Huro Shunkur Sandyal*, 7 W. R. 29. A cause of action in a suit for partition arises against a co-sharer when such co-sharer obtains possession of the entire joint property under a survey award. *Kali Chunder Chowdhry v. Jogendro Narain Roy*, W. R. 1864, p. 323. In the case of *Shibosoonduree Dossee v. Kalichurn Roy*, W. R. 1864, p. 296, it was held that a right of action accrues to a co-sharer for his share of the profits of a joint-estate received by a manager, from the date of each payment of the rent of such estate to the manager, and that limitation runs from the date of every such payment; further, that as each payment of rent to the manager gives a co-sharer a fresh cause of action, although the co-sharer does not claim or receive his share for a period of more than twelve years, his suit for his share received within twelve years is not barred. It seems doubtful, however, how far this decision is consistent with the provisions of Clause 13, Section 1 of this Act. Compare *Ahmed Reza v. Enayut Hossein*, W. R. 1864, p. 235.

In a suit by A, the surety of a lessee, for the refund of rent paid by him to B who had wrongfully claimed to be the heir of a deceased lessor, the cause of action as

against B was held to date from the time when A was declared by a competent Court to have paid to a party without title. In a suit against the lessee, A's cause of action was considered to have accrued from the time when, on the default of the lessee, A was compelled to pay rent to the rightful heir. *Roy Huree Kishen v. Ranee Asmedh Koonwur*, W. R. 1864, p. 57.

It was agreed that B on obtaining a decree for certain lands, should convey to A a portion thereof. B on obtaining his decree failed to fulfil the agreement. A sued for specific performance of the contract. It was pleaded that as more than twelve years had elapsed from the date when the contract was executed, the suit was barred. But it was held that as A had sued within twelve years from the date when B obtained his decree, the suit was in time. *Thakoor Sreenath Singh v. Asmeer Khan*, 1 W. R. 144.

A leased certain lands to B for a term of years, stipulating that B should, out of the rents payable by him, make an annual payment to C, a creditor of A, until A's debt to C should be discharged. B's payments to C stopped before the whole debt of A to C was liquidated. C sued A for the balance and got a decree. A then sued B for the amount which he had been compelled to pay to C. It was held that A's cause of action against B arose from the date when the latter had failed to pay C in accordance with the terms of his lease, and not from the date of C's decree against him. *Zoolfee Begum v. Ram Surun Roy*, 10 W. R. 80.

A granted a *putnee* of certain land to B, which was subsequently sold for arrears of rent, under Section 105, Act X of 1859, free from encumbrances, and purchased by A himself. At the date of the sale, C had held a portion of the land included in the *putnee* as a trespasser, for more than twelve years. In a suit by A against C to recover possession, it was held that A's cause of action arose when he purchased B's rights, not from the time when C first

took possession. *Oomesh Chunder Goopto v. Rajnarain Roy*, 10 W. R. 15.

In a suit brought to recover from the defendant money paid to him by Government as compensation for land taken for public purposes, which land the plaintiff alleged to be his own and not the defendant's, it was held that the plaintiff's right of action against the defendant accrued at the time when the defendant first took the money from Government; and that the ignorance of the plaintiff in regard to the accrual of his right did not prevent time from running against his suit, such ignorance not being the result of the fraud of the defendant. *Lallah Gopeenath v. Azroal Singh*, 8 W. R. 23.

Where moveable property which has been lost is found in the possession of a person who refuses to restore it, the owner's cause of action arises from the date of such refusal. The loss of the property would give the owner a right to recover it when he found it, but it could give no right of action against any particular person. It is only when the property is found in the possession of another who refuses to restore it, that a cause of action can be said to arise against that person. *Bholabutty Kooncur v. Ram Pertab Singh*, 9 W. R. 586.

In a suit to set aside an adoption made by a Hindoo widow, the defendant, the adopted son, pleaded limitation, inasmuch as the suit had not been commenced within twelve years from the date of the adoption; but it was held that in the absence of a distinctly recorded consent or acknowledgment by the adopting mother, or an authoritative assertion as against the plaintiff by the supposed adopted son of his title as proprietor, or a distinct recognition of, and acquiescence in the alleged adoption by the plaintiff, no time could be fixed from which to reckon the period of limitation. *Sooburnomonee Dabee v. Petumber Dobby*, 1 Hay, 497.

In another case in which a daughter, after the death

of her mother a Hindoo widow, sued to establish her right to inherit certain immoveable property which had belonged to her deceased father, and to set aside the adoption of the defendant by her mother, the Court held that the plaintiff's cause of action arose from the date of the adoption and not from her mother's death. It was observed that "the adoption was not an alienation of the widow's rights, but a proceeding by which these rights were absolutely determined and vested in another. From the moment of the adoption, the defendant acquired a *status* as owner of the property altogether adverse to the plaintiff. There was an adverse possession of which the plaintiff, as a daughter of the house, could not possibly have been ignorant. The mother ceased to hold as widow, and could only continue to hold avowedly before the world as guardian of the son." *Radha Kissors Dossee v. Guthee Kissen Sirkar*. W. R. 1864, p. 272. But in the more recent case of *Juggendronath Banerjee v. Rajendronath Holdar*, 7 W. R. 357, an opinion was expressed by the Court that as the right of a reversionary heir, under the Hindoo law, to succession on the death of a widow in possession is merely a contingent one, and it is only on the death of the widow, when his rights as reversioner are converted into a right to immediate possession that he is required to sue for possession of the estate, the mere fact of an adoption of a son by the widow will not prejudice the reversioner's rights, which can only be taken to be invaded so as to give him a cause of action when the adopted son, on the death of the widow, takes possession of the property as adopted son. This opinion seems, however, to be somewhat broadly stated, and as it does not appear from the judgment of the Court that the defendant, the adopted son, had averred or attempted to prove his possession during the widow's lifetime, or that the plaintiff had ever by any act recognized his adoption, the case may in reality be considered to have been dis-

posed of in accordance with the principles laid down in the case of *Sooburnomonee Dabea*, above cited. In the case of *Hurronath Chowdhry v. Huree Lall Shaha*, 11 W. R. 477, it was said that "the mere notice that an adoption has taken place, is not of itself a cause of action upon which any person is bound to sue, and from the date of which, therefore, limitation would run. But if, on the adoption, the adopted son is put into possession, it may then be a question how far this possession is adverse, so as to bar the next heir who contests the adoption, if he does not sue to set it aside within twelve years from the date on which the adopted son obtained possession." Compare *Bhyrub Chunder Chowdhry v. Kali Kissur Roy*, S. D. 1850, p. 369; *Radha Madhub Adhikary v. Gobind Kishore Roy*, S. D. 1856, p. 450, S. D. 1857, p. 377. See also the case of *Radhakissen Mahapater v. Sreekissen Mahapater*, 1 W. R. 62, in which the plaintiff a first adopted son sued to set aside the adoption of a second son as invalid.

The question as to the time when a cause of action shall be taken to have accrued to a reversionary heir will be found considered at length in the remarks on Clause 12, Section 1, of the Act.

According to the Mahomedan law, dower is either *mowj-ul*, i. e., immediately exigible, or *mowujjul*, i. e., deferred. Exigible dower is payable on demand at any time during the continuance of the marriage. Deferred dower is claimable only on the dissolution of the marriage by death or divorce. *Tajunnissa Khatoon v. Hosseinooddeen Chowdhry*, W. R. 1864, p. 199. From the ruling of the Calcutta High Court in the case of *Beebee Jameela v. Mahomed Hossein*, W. R. 1864, p. 252, it would appear that where nothing is expressed at the time of the marriage as to whether the dower is to be exigible or deferred, it must all be considered as exigible, and as such may be demanded and recovered from the husband at any time during the subsistence of the marriage. On the other hand, it has been

held by the Bombay High Court, that where it has not been settled at the time of the marriage whether the payment is to be prompt or deferred, one-third of the dower should be considered as exigible during the subsistence of the marriage, and the remaining two-thirds as recoverable only on the dissolution of the marriage. *Fatima Beebee v. Sadruddin*, 2 Bom. 307. In respect to a claim for deferred dower, limitation runs from the time when the marriage is dissolved. *Mir Mahar Ali v. Amani*, 2 Ben. A. c. 306. In respect to a claim for exigible dower, it would seem formerly to have been the received opinion that limitation should be taken to run from the date of the celebration of the marriage. *Macpherson's Civil Procedure*, 4th ed. p. 75. But the decision of the Privy Council in the case of *Ameeroonnissa v. Mooradoonnissa*, 6 Moore's I. A. 211, may be taken to shew that even in a suit for exigible dower, limitation should only be reckoned from the date when the marriage is dissolved. Compare the cases of *Tajunnissa Khatoon*, *Beebee Jameela* and *Fatima Beebee*, above cited, and see also the case of *Kurrunnissa v. Abdool Ali*, 9 W. R. 153. In these cases, however, it does not appear that any demand had been made during the continuance of the marriage for payment of the dower. Where such a demand has actually been made and refused, it may be thought that limitation should be held to run from the date of such refusal. But see the cases of *Nathi v. Daud*, 2 Bom. 309, and *Begoo Jaun v. Gasse Beebee*, 6 W. R. c. R. 19.

In the case of *Ranee Emamun v. Hurdial Singh*, W. R. 1864, p. 301, it was held that a suit might be maintained upon a judgment of a Court in this country, which had been lost or destroyed, and that in such a suit, the cause of action should be taken to arise from the date of the lost judgment. Compare *Golab Koonour v. Shah Keramut Hossein*, 3 W. R. 101. But the decision of the Agra High Court in the case of

Choonnee Loll v. Runjeet, 1 Agra, 78, would indicate that where a judgment has been lost or destroyed, the proper remedy is not by a regular suit to establish the judgment, but by proceedings in execution in which proof may be given of its terms. Compare *Sandes v. Jomir Shaikh*, 9 W. R. 399, in which case it was remarked that there would be no end to litigation, if a fresh suit might be maintained on a decree. See also *Lakshmamma v. Venkataragava Chariar*, 4 Mad. 89. But it has been held that a suit may be maintained in the High Court, on the original side, upon an unsatisfied judgment of the Calcutta Court of Small Causes, *Mohendronath Ash v. Beedobodun Dutt*, 1 Ind. Jur. n. s. 220; and that in such a suit the cause of action arises from the date of the judgment. *Jussorut Khan v. Kanyeloll Dey*. "Indian Daily News," 13th August, 1866.

Where a plaintiff sued on a judgment of a foreign Court which had been passed more than six years before the institution of his suit, and contended that as his cause of action did not accrue within the cognizance of the Indian Court until certain proceedings in execution taken in the foreign Court and continued up to a period within six years from the date of the institution of the suit in the Indian Court had proved infructuous, his claim was not barred, it was, nevertheless, held that limitation applied. It was observed that where the obligation to pay, imposed by the judgment of a foreign Court, is final and definite, the mere fact of non-payment renders the cause of action complete, irrespective of any proceedings which may be taken in execution for obtaining payment; and that as the judgment-creditor is not bound to take any such proceedings, his right against the judgment-debtor stands entirely clear of them, and consequently his title to come into another Court to enforce that right by suit must be clear of them also, and must date from the day when the judgment was finally given.

Heeramonee Dossee v. Promothonath Ghose, 8 W. R. 32.
Boloram Gooy v. Kameenee Dossee, 4 W. R. 108.

A purchaser at a *private* sale cannot be allowed in instituting a suit for possession to reckon limitation as running from the date of his purchase. Such a purchaser must go back to the date when the right of action accrued to his vendor. If it were otherwise, limitation could not be applied at all, since every private purchaser would get a fresh start on every succeeding conveyance. *Ajoodhya Pershad v. Bhikaree Pandah*, 3 W. R. 176. No distinction is to be made in favour of a purchaser under an execution sale, as contra-distinguished from a private purchaser. *Enayet Hossein v. Giridhari Lal*, 2 Ben. P. c. 75.

A different rule applies in the case of an auction purchaser at a sale for arrears of Government revenue. *Andrews v. Hurree Mohun Thakoor*, W. R. 1864, p. 30; *Shib Ram Chunder Mundul v. Pureeag Singh*, 3 W. R. 165. In the latter case, the plaintiff having sued for the reversal of an award made by the survey authorities, the defendant pleaded that the action was barred, inasmuch as it had not been brought within three years from the date of the award. It was, however, held that as the plaintiff was no party to the award, inasmuch as he was an auction purchaser at a sale for arrears of Government revenue subsequent to the award, the suit was not barred. Compare *Bhowanee Sunkur Singh v. Bidaruth Koonwur*, S. D. 1857, p. 1913; *Bhowanee Singh v. Hurdyal Singh*, S. D. 1858, p. 470; *Komul Kishen Surkhul v. Bissonath Chuckerbutty*, W. R. sp. 128, decided by a Full Bench. These decisions rest upon the principle, that as all landed property comprised in the decennial settlement is considered as perpetually hypothecated to Government for the revenue assessed thereon, a sale for arrears of revenue transfers to the purchaser all the property and privileges which the engaging party possessed and exercised at the time of settlement, free not only from subse-

quent encumbrances or transfers by the party engaging, and those who claim under him, but also from the consequences of his, or their omissions. For this reason, a purchaser at a revenue sale does not claim under the person whose estate is sold, and is not barred even by a decree against him. *Macpherson's Civil Procedure*, 4th ed. pp. 54-56: *Prandhone Dutt v. Bazl-ool-Rahman*, 8 W. R. 222.

The principle on which purchasers of estates at sales for arrears of Government revenue, acquire such estates in the condition in which they were at the date of the perpetual settlement, is equally recognized by the last sale law—Act XI of 1859—as by the sale laws previous to it; and applies as much to actual encroachments by neighbours, as to encumbrances or under-tenures created by the old proprietor, or by his laches. *Huru Chunder Ghose v. Goluck Monnee Dossee*, 8 W. R. 62. But see the judgments of NORMAN and CAMPBELL, JJ., in the case of *Boykuntnath Chatterjee v. Ameeroonnissa Khatoon*, 2 W. R. 191; and compare the judgment of the Privy Council in the case of *Ranee Surnomoyee v. Maharajah Sutteeschunder Roy*, 10 Moore's I. A. 123.

The title of a purchaser at a sale for arrears of revenue, accrues not from the date of sale, but from the date on which the sale is confirmed and certificate granted under Section 20, Act I of 1845. Consequently when such a purchaser sues for resumption, limitation will be reckoned against him from the latter, and not from the former date. *Dheput Singh v. Mothooranath Jah*, W. R. 1864, p. 278. But the title of a purchaser at a sale in execution of a decree, accrues from the date of the sale, and not from the date when he obtains his sale certificate. Accordingly where such a purchaser, never having had possession, sues for possession of the purchased lands more than twelve years after the date of sale, his claim is barred. *Kalee Doss Neoghee v. Huro Nath Roy Chowdhry*, W. R. 1864, p. 279.

Where lands are purchased at a sale in execution of a decree, the possession of the purchaser commences from the date of delivery to him in the manner provided in Section 264 of Act VIII of 1859, and not from the date of the sale. *Shaikh Akbur Ali v. Asud-collah*, 7 W. R. 60. Where a person purchased certain lands at an auction sale for arrears of revenue and obtained possession, but after litigation was dispossessed, and subsequently sued for recovery of the lands, it was held that limitation was to be calculated, not from the date of the purchase, but from the time of the dispossession. *Wise v. Bhoobun Moyee Dabea*, 3 W. R. P. C. 5.

Where the title of a mortgagor is disputed by a third party who obtains possession of the estate under a decree of a Civil Court, the possession of the third party is adverse to the mortgagee, whose cause of action against him to enforce the conditions of the mortgage, will be taken to accrue from the date when such adverse possession was obtained. *Prossonno Coomar Sein v. Ram Coomar Sein*, W. R. 1864, p. 375.

The nonsuit of a plaintiff in a previous suit brought upon the same cause of action, cannot be held to give him a new cause of action from which limitation may be reckoned. *Haradhun Dey v. Ramdoss Dey*, 6 W. R. 15. Where a Court after hearing a suit decides an issue of limitation in favour of the plaintiff, but nonsuits him upon other grounds, the decision upon the point of limitation is not to be taken as conclusive in a fresh suit between the same parties with regard to the same subject matter. *Bindabun Chunder Sirkar Chowdhry v. Muddun Mohun Chunder Chowdhry*, 4 W. R. 104.

A borrowed money from B, and as security for repayment pledged with him a bond executed in his, A's, favour by C, and agreed that if he, A, did not repay B the sum borrowed on demand, B should be at liberty to enforce payment of the amount due from C on the bond.

A failing to pay, B sued him and obtained a judgment. Limitation in the meanwhile having run against C's bond pledged with B, A sued B for the damages sustained through B's failure to sue C thereon within the statutory period. It was held by the Agra High Court, that although by his agreement with A, B had power to sue C on the bond, he still was not bound to do so, either in his own interest or in the interest of A; and that if A's right of suit was lost, it was lost through his own omission to pay off his debt to B, and so obtain from him the return of the pledged bond. *Makund Lall v. Raghoput Dass*, 2 Agra, 83.

A having instituted a suit against B, withdrew it upon receiving from B a verbal promise to pay him a certain sum. Afterwards, on B's failure to pay the sum promised, A sued him for the amount. B pleaded that there had been no consideration for his promise, inasmuch as A's cause of action in the first suit had been barred by limitation. It was held that this defence was bad, and that the Court in which the second suit was brought, was not bound to enquire whether the first suit was barred or not. *Sreenath Banerjee v. Doorga Dass Nundy*, 9 W. R. 216.

In a suit against a guardian for mismanagement of his ward's estate, it was sought to make him accountable for certain sums paid by him in discharge of debts which, at the time of payment, were barred by limitation. It was decided that in the absence of proof that the debts so discharged were fictitious debts, it was no ground for disallowing such payments that limitation had run. *The Government v. Chowdhry Chuttarsal Singh*, 3 W. R. 57.

The bare possibility that the law of limitation may ultimately become a bar to the recovery of assets, is not such a danger of misappropriation as will warrant the granting to the Administrator-General an order under Section 12, Act VIII of 1855, to apply for letters of

administration of the effects and estate of a deceased Hindoo or Mahomedan. *Girdar Das Vallaba Das*, 1 Mad. 234.

How far the equitable doctrine of laches and acquiescence is applicable to suits instituted in the Civil Courts of this country, will be found considered hereafter, in the remarks on Section 16 of the Act.

The term prescription has a two-fold sense, and may generally be defined as a law which is of force either, 1st, to establish, *positively*, a right of property upon possession had for a certain time and in a certain manner; or 2nd, to destroy, *negatively*, the right of action after a certain time has run. It is thus either a means of acquiring rights, or of barring claims. In the first of these significations it is known as positive, in the second as negative prescription. The law of limitation is the law of negative prescription. It might be thought that this division of prescription into positive and negative, merely describes the operation of the same law regarded from different points of view: but the two kinds of prescription have commonly been treated as separate and distinct, and as productive of different results.

Whether, and to what extent, title may be acquired in this country by positive prescription, are points on which the law is not explicit and the decisions are conflicting. In moving the first reading of the amended Bill "for regulating the acquirement and extinction of rights by prescription and for the limitation of suits," Sir James Colville expressed an opinion that the principle of positive prescription although not new in India, being apparently contemplated in various texts of the Hindoo Law, was not recognized in the Regulations, under which the negative prescription by the limitation of suits was alone introduced. It may, however, be thought that the principle of positive prescription is, at least indirectly, recognized in Regulation II of 1805, of the Bengal Code, by Section 3,

Clause 4 of which it is provided that “no length of time shall be considered to establish a prescriptive right of property, or to bar the cognizance of a suit for the recovery of property, in cases of mortgage, or deposit, wherein the occupant of the land or other property may have acquired or held possession thereof as mortgagee or depositary only, without any proprietary right; nor in any other case whatever wherein the possession of the actual occupant or those through whom his occupancy may have been derived, shall not have been under a title *bonâ fide* believed to have conveyed a right of property to the possessor.” It will be noticed that the prescriptive right of property, and the bar of limitation are here disjunctively spoken of; and it seems reasonable to infer that it was the intention of the Legislature that in all cases not falling within the disabling conditions set forth in the Clause, length of time should not merely create a bar of limitation, but should also establish a prescriptive title in the occupant. It may further be inferred from the preceding provisions of the Regulation, that such a prescriptive title might be acquired as against Government by an honest, peaceable, and undisturbed possession for sixty years, and as against all others by a similar possession for twelve years.

In the case of *Gunga Gobind Mundul v. The Collector of the 24-Pergunnahs*, 7 W. R. P. C. 21, it was held by the Privy Council that where a landowner, whose lands are encroached upon, suffers his right to sue for recovery to be barred by limitation, the practical effect of his laches is the extinction of his title in favour of the party in possession. In this case their Lordships said:—“It is of the utmost consequence in India that the security which long possession affords, should not be weakened. Disputes are constantly arising about boundaries and about the identity of lands. Contiguous owners are apt to charge one another with encroachments. If

twelve years peaceable and uninterrupted possession of lands can be proved, a purchaser may take that title in safety. * * * * As between private owners contesting *inter se* the title to the lands, the law has established a limitation of twelve years: after that time it declares not simply that the remedy is barred, but that the title is extinct in favour of the possessor." Compare *Kishen Soondur Surma v. Enaetoollah Chowdhry*, 8 W. R. 386; *Brojo Mohun Chuckerbutty v. Bissonath Komilla*, 10 W. R. 61; but see *Ram Dutt Chowdhry v. Luckhee Kooer*, 11 W. R. 447.

In the case of *Kullammal v. Kuppu Pillai*, 1 Mad. 85, the Madras High Court intimated an opinion that Act XIV of 1859, bars the remedy only, without extinguishing the right, as was the case under the limitation statutes in England before the passing of 3 & 4 Will. IV, c. 27, by Section 34 of which it was expressly enacted that at the end of the period of limitation, the right and title of the party out of possession shall be extinguished, a provision which is not to be found in the Indian Limitation Act. Compare *Boloram Gooy v. Kameenee Dossee*, 4 W. R. 108; *Govindan Pillai v. Chidambara Pillai*, 3 Mad. 99.

In several decisions of the Bombay High Court it has been held that as Act XIV of 1859, in the shape in which it eventually became law, contains no provision which expressly relates to the acquisition of title by positive prescription, the law as it formerly stood on this point, remains unchanged. Clause 1, Section 1, Regulation V of 1827 of the Bombay Code enacts that "whenever lands, houses, hereditary offices, or other immoveable property have been held without interruption for a longer period than thirty years, such possession shall be received as proof of sufficient right of property in the same." This provision, the effect of which is to give a positive title in cases in which there has been an adverse possession for the period named, has been held not to be affected by Act XIV of 1859.

Anuji Dattushet v. Morushet Bapushet, 2 Bom. 334; *Rambhau Bapushet v. Bhai Bapushet*, 2 Bom. 333. So, where a charitable grant in connection with a temple was proved to have been enjoyed by the incumbent of the temple and by those under whom he held in regular succession for more than thirty years, it was decided by the Bombay High Court that a right of property in the grant had been acquired under the provisions of the Regulation cited. *The Collector of Kheda v. Harishankar Tikam*, 5 Bom. A. C. 23. Compare *Desai Kalyanraya Hukamatraya v. The Government*, 5 Bom. A. C. 1.

Questions as to the acquisition of rights by positive prescription have chiefly arisen in connection with claims to what are known to the English law as *easements*, and to the Roman law and the systems derived from it as *servitudes*. Such, for example, are a right of way over another's land, a right to bring water through another's land by an artificial water-course, and the like.

In the case of *Bandhoo Sookoolaney v. Joy Prokash Singh*, W. R. 1864, p. 367, the plaintiff sued for a declaration of his right to maintain certain earthworks by means of which irrigation was secured to him, and which he alleged the defendant had removed. The Judge, finding that the plaintiff's user of the water by means of such works had not been proved either for twelve or for sixty years, held that a prescriptive right to their maintenance had not been established. On appeal to the High Court, it was observed—"the Judge's presumptions of twelve years and of sixty years are irrelevant. No presumption of law in regard to rights in respect to water are known in this country: but the proof of ancient reasonable user by particular recognized means is sufficient to give right."

In the case of *Bhugwan Chunder Chowdhry v. Shaikh Khosal*, 7 W. R. 271, the Court said:—"We do not find that it has any where been decided by this Court that a

right of way must be shewn by user for exactly and fully twenty years in order to give a right by prescription or presumption of a grant. No such definite period has been fixed in this country. Proof of well established and fixed user has been generally regarded as sufficient. It certainly is a question whether by analogy, proof of a user of twenty or nearly twenty years might not be required. Then again the question arises, whether twenty years which is the usual term of prescription in England, would not more properly be represented in this country by twelve years, a period probably adopted in the earlier Regulations as the custom of the country."

In another case in which a question arose as to whether the length of user established by the evidence put forward by the plaintiff was sufficient to create a title by prescription, the Court observed:—"It is not necessary for us to determine in this case the precise length of user by which a title by prescription can be created. We think that any period shorter than *twelve* years, the ordinary period prescribed by the Statute of Limitations, is not sufficient for the purpose. The evidence produced by the plaintiff does not carry his case beyond *ten* years. *Doorga Churn Paul v. Pearee Mohun*, 9 W. R. 283. Compare *Ramdhone Bhattacharjee v. Huro Soonduree Dabea*, 7 W. R. 276, in which it was said that a user for four or five years only, is not sufficient to establish a right of way by prescription.

In the case of *Ameer Ally v. Joyprokash Singh*, 9 W. R. 91, the plaintiff sued for the removal of a *bund*, which he alleged had been wrongfully raised by the defendant on his, the plaintiff's, land. It was said by PEACOCK, C. J.:—"The plaintiff could not sue to have the *bund* removed, if the defendant had exercised the right of having it in the state in which it existed at the time of the commencement of the suit for a period of twelve years previously. In England an easement may be claimed by non-existing grant, after

it has been used adversely and uninterruptedly for a period of twenty years; and in many cases the period of twenty years confers a right under the English Prescription Act. That Act, however, does not apply to the Mofussil here, and there is no magic in the number 20. I am inclined to think that by analogy to the Indian Limitation Act, an adverse and uninterrupted user of an easement for twelve years would confer a right to it. But it is premature for us to decide the point in this case. The point has not been argued, and any decision at present upon it, would, at most, amount to a *dictum*." The case was accordingly remanded to the Judge of the lower Court for re-trial, with directions that in determining whether the *bund* was ancient or prescriptive, he should define the sense in which he used these words; so that, if necessary, the law might afterwards be applied to what he might find to be the facts of the case with reference to the period for which the *bund* had been adversely and uninterruptedly used.

In another case in which the defendant claimed to have a prescriptive right of way over the plaintiff's land, an opinion was expressed by PHEAR J. that "a Court which has to ascertain facts from the evidence, ought not to infer from user, and from user alone, that a right of way has been conferred by the owner of the land upon the person who is shewn to exercise the user, unless that user has extended over a period at least as long as the period which the law would allow to the owner of the land for bringing an action of ejectment, supposing he had been absolutely excluded from the possession of the land, instead of being only hindered in the complete enjoyment of it by the acts of user of the way." *Mohima Chunder Chuckerbutty v. Chundee Churn Goocho*, 10 W. R. 452.

The last two decisions would seem to show that proof of uninterrupted user for twelve years is required to estab-

lish a prescriptive right to an easement, and that proof of user for a shorter period will not suffice for that purpose. But in the case of *Juggurnath Roy Joogee v. Kistomohun Mookerjee*, 11 W. R. 236, a contrary opinion was expressed by a Division Bench. In this case, L. S. JACKSON, J. said:—"I am not aware that in any case yet decided, it has been finally laid down that any particular period is necessary to the establishment generally of what is called a prescriptive right. * * * It seems to me that cases are quite conceivable in which the plaintiff might not be able to give evidence of actual user for more than four, five, or six years, and yet the circumstances might be such, that a Court would be warranted in inferring the existence of a right." It may be thought, however, that a right inferred under such circumstances would not be a prescriptive right. In the more recent case of *Kartick Chunder Sirkar v. Kartick Chunder Dey*, 11 W. R. 522, BAYLEY and MACPHERSON, JJ. intimated their dissent from the opinion that "no particular period is necessary for the establishment generally of a prescriptive right," and held that there must be at least twelve years undisturbed enjoyment.

A user must be proved to have existed from a time from which the right would be gained, or be presumed to have been gained. Such an indefinite finding as that the user has been enjoyed "all along" or "from before" will not establish a right. *Mooktaram Bhuttacharjee v. Hurro Chunder Roy*, 7 W. R. 1. But compare *Wuzeerooddeen v. Sheobund Lall*, 11 W. R. 285; *Kartick Chunder Sirkar v. Kartick Chunder Dey*, 11 W. R. 522. As to what may be taken as sufficient evidence of a prescriptive right to draw water from a tank on another man's land, see *Bhyrub Lall Tewaree v. Toolsee Doss Kabeeraj*, 8 W. R. 311.

The following decisions relating to easements, although some of them do not directly bear on the question of

the acquisition and extinction of title by prescription, may perhaps be usefully noticed in connection with that subject.

The general rule of law in cases in which an easement is claimed to have been acquired by prescription is, that there must have been an uninterrupted user exercised as of right, and neither by force nor by stealth, nor at the mere will of the other party. Moreover the right claimed must not be so large as to extinguish or destroy all the ordinary uses of the servient property. *Zumeer Ali v. Durgahin*, 1 W. R. 230. In cases where there is no express grant, the right to an easement must be limited by the amount of enjoyment proved to have been had, and where a lower Court has found upon the evidence that a plaintiff has not proved his user, as of right, of an easement on the defendant's land, the High Court cannot interfere in special appeal, or be warranted in inferring a user in the absence of evidence of the plaintiff's enjoyment thereof. *Zumeer Ali v. Durgahin*, 2 W. R. 212.

The enjoyment of private watercourses taken from a common canal is regulated by established user, and no one is entitled to open a new conduit for the purpose of taking additional water to the injury of his neighbours. *Athur Ali Khan v. Sekundur Ali Khan*, 4 W. R. 28; *Hurbuns Narain Singh v. Sardowan*, 11 W. R. 254. Where there is a prescriptive right to conduct water through another's lands by an artificial watercourse, the ordinary right of a riparian proprietor to the use of the water of a natural watercourse passing through his lands cannot be applied. *Syud Keramut Ali v. Bhoop Narain Singh*, 6 W. R. 99.

Where the drainage of A's land falls into a natural watercourse, A has a right to have the rain-fall of his lands discharged through it, by natural agency; and even although the watercourse pass through the lands of B, B cannot erect a *bund* thereon so as to interfere with A's right. Such a right with respect to

a natural watercourse, although a right in *alieno solo*, is an ordinary incident of property, not acquired by long and continuous user, and in no way dependent on the consent, express or implied, of the owner of the land through which the watercourse passes, and is sometimes called a natural right in contradistinction to rights acquired by grant or user. Such a right may, however, be abandoned, and the abandonment may either be by express agreement between the owner of the dominant land, *i. e.*, the land which derives benefit from the exercise of the right, and the owner of the servient land, *i. e.*, the land which has to suffer the exercise of the right, or the abandonment may be implied from a long and continuous interruption on the part of the owner of the servient land, submitted to by the owner of the dominant land. But where the watercourse is an artificial one, then the plaintiff's right to discharge the rain-fall of his land through it, is not a natural right, or one of the ordinary incidents of property, but a right which the plaintiff may acquire, either by express grant, or by long and continuous user, submitted to by the defendant. And this acquired right may, like the natural right, be abandoned either by express agreement between the owner of the dominant, and the owner of the servient land; or it may be implied from a long and continuous interruption on the part of the owner of the servient land, submitted to by the owner of the dominant land. *Khetternath Ghose v. Prossonno Ghose Gowalah*, 7 W. R. 498.

A wrongful interruption to a right of user of a channel for the egress of water accumulating on the surface of the plaintiff's lands, into a river, does not necessarily destroy the right of user, unless such interruption has been acquiesced in by the party wronged. *Roy Luchmee Pershad v. Fuzelutoonnissa*, 7 W. R. 367.

A prescriptive right to the flow of the surface drainage water from the land of another, can only be acquired

where the water flows in a definite channel. Where a plaintiff sued, alleging that the defendant had interrupted the flow of water from his land to the land of the plaintiff, and it appeared that eight years before the suit, the defendant had diverted the water, and that it had remained diverted ever since, the Court held that the right, if acquired, would not necessarily be lost by the interruption, but that if the plaintiff acquiesced during all that time in the interruption, it might be some evidence of the abandonment of the right. *Kena Mahomed v. Bohatoo Sirkar*, Marsh. p. 506. Where a right of user of a drain or passage is incidental to a house, the right is not affected by the owner of the house letting it to a tenant. *Anjudee Begum v. Ahmed Hossein*, 6 W. R. 314.

A right of way over another man's land is an easement which arises either by grant of the owner of the soil, or by prescription which supposes a grant, or from necessity: and the right imports *ex vi termini* a right of passing in a particular line, and not the right to vary it at pleasure. This would be an abuse of the right, and might be an inconvenience to the land charged with the easement. *Goluck Chunder Choudhry v. Tarinee Chuckerbutty*, 4 W. R. 49. Where the owner of a patch of land lying between a village and a public road, allows his neighbour's cows to stray over it on their way to pasture, such a right of easement is not thereby created over the land as will deprive the owner of the right of cultivating it. *Gunga Gobind Chatterjee v. Gooroochurn Goon*, 8 W. R. 269. Where A has from time immemorial enjoyed a right of way across B's lands, and B builds a wall which obstructs such right of way, A may sue to have the wall pulled down; and it will be no defence that there is another pathway through B's lands, by which A might have access to his house. *Fukeer Chand Bagdee v. Sham Bagdee*, 6 W. R. 222. It has been held that a plaintiff may have a prescriptive right to pass and repass in boats during the rainy season by a

channel over his neighbour's (the defendant's) lands, although the general public have no such right of passage, although the having the channel open is injurious to the defendant's tank, and although the channel itself does not lead to the plaintiff's house, and he is not inconvenienced by the passage being refused him. *Ramsoondur Burrall v. Woomakant Chuckerbutty*, 1 W. R. 217. A plaintiff's prescriptive right to ply a ferry, may also include a right to embark or disembark on the defendant's land, at a season when, from the rise of the river, the ferry cannot be used without doing so. *Bilash Monee Chowdhrair v. Brojo Kishoree Chowdhrair*, 5 W. R. 195.

A right of way over land taken possession of in execution of a decree, cannot be established by a party intervening for that purpose under Section 230, Act VIII of 1859, since the question as to the right of way is no reason why the purchaser at the execution sale should not obtain possession of the land. A party desiring to establish a right of way must proceed by regular suit. *Nobin Chunder Mozoomdar v. Jutadharee Holdar*, 2 W. R. 289.

By the provisions of Act VI of 1857, a right of way cannot continue to exist over land acquired under that Act by a Railway Company. The express provisions of the law are inconsistent with such a right. If, however, the Company by their representations and conduct lay themselves under a legal obligation to provide a way, such legal obligation may be enforced. *Nobin Chunder Ghose v. The Collector of the 24-Pergunnahs*, 3 W. R. 27.

Where certain lands were exchanged for others, and in the instrument under which the exchange was carried out, it was expressed that each party gave up all rights and interests in the lands which he had formerly possessed, it was held by a Division Bench that these words could not be interpreted as a relinquishment by one of the parties of a previous right of way over the lands which he had given up. *Deen Dyal Sein v. Kallee Kishore Roy*,

4 W. R. 83. The judgment of the Court is not very clear, and its correctness may be doubted.

A party who is in enjoyment of ancient lights and air is entitled to preserve the free use of them, and where another wilfully and intentionally obstructs them by the erection of a wall, he can be compelled to remove the obstruction. Money damages may be no compensation to the party injured. *Syud Jafur Ali v. Syud Mahomed Hossein*, 4 W. R. 23. But where A built an upper story to his house overlooking the inner apartments of B, who thereupon erected a wall which deprived A of his ancient lights and air, it was held that as A was the first and greatest wrong-doer he was not entitled to relief by the removal of B's wall. *Sreenath Dutt v. Nundo Kishore Bose*, 5 W. R. 208.

In a suit to restrain an owner of adjoining lands from building a wall, so as to obstruct the light and air which the plaintiff has always enjoyed, it is no answer to plead that besides the windows obstructed by the defendant's wall, the plaintiff has other windows on another side of his premises, since he is entitled to retain the light and air he has always had, and the owner of the adjacent land cannot obstruct it. *Ooday Chand Mullick v. Puran Mullick*, 3 W. R. 29. In this case it was observed that it would have been ridiculous to have ordered apertures to have been made in the defendant's wall opposite the plaintiff's windows, through which he might have retained the light sought for, since, if it had been possible for the plaintiff in this way to preserve his light, he would still have been shut out from his ancient supply of air. But in another case, *Ajnas Koonwur v. Beharee Sahoo*, 6 W. R. 86, in which the plaintiff complained that the apertures in her house for the egress of smoke and the ingress of air had been blocked up by a wall built by the defendant on his own ground, and prayed that the wall might either be destroyed or removed to the distance of a cubit

from her wall, the Court held that the defendant should not be required to pull down his wall, but must make apertures in it corresponding to those in the plaintiff's house.

In the case of *Barrow v. Archer*, 2 Hyde, 125, the plaintiff sought an injunction to restrain the defendant from erecting a certain building which he alleged would intercept from the upper floor of his premises, light and air which he had uninterruptedly enjoyed for more than twenty years,* and to which he therefore claimed a prescriptive right. As it appeared, however, that a sufficient space would be left between the plaintiff's house and that which the defendant proposed to erect, to admit a reasonable supply of light and air, the Court held that the injunction could not be granted. It was remarked that it is not every speculative exclusion of light, or even sensible diminution of light, that gives a right of action, but such a diminution of light as really makes the premises to a sensible degree less fit for occupation or business; and that as the right to air is co-extensive with the right to light, where there are sufficient means of ingress for the one, it will be presumed that there are sufficient means of ingress for the other. Compare *Bagram v. Khettranath Karformah*, 3 Ben. o. c. 18, in which the subject of easements was very fully discussed.

In the case of *Komathi v. Gurunada Pillai*, 3 Mad. 141, it was held by the Madras High Court, on the analogy of the English law, that the invasion of the privacy of the owner of an adjoining tenement by opening windows overlooking his premises is not a wrong for which the law gives any remedy. But in the case of *Manishankar Hargoran v. Trikam Narsi*, 5 Bom. A. c. 42, it was held by the Bombay High Court that in accordance with the usage of Gujarat as established by a series of decisions extending over a long

* The premises were situated in Calcutta, where it was thought that the English law of prescription was applicable.

number of years, an invasion of privacy is an actionable wrong, and that a man may not open new doors or windows in his house, or make any new apertures or enlarge old ones in a way which will enable him to overlook those portions of his neighbour's premises which are ordinarily secluded from observation, and so intrude upon his privacy. It was observed that the decision of the Madras High Court in the case last cited, to the effect that an invasion of privacy is not an actionable injury, is not an authority which can be followed in a matter of this kind, which is governed by the usage of the district, which has frequently been declared.

SECTION 1, CLAUSE 1.

To suits to enforce the right of pre-emption, whether the same is founded on law or general usage or on special contract, the period of one year to be computed from the time at which the purchaser shall have taken possession under the sale impeached.

SHUF^{AA},* or the right of pre-emption, is a creation of the Mahomedan law, but its application has been extended by usage in various part of India to others than Mahomedans. Much difference of opinion would seem to have prevailed among the Mahomedan jurists, as to the period within which the right could be exercised. In the case of *Mahomed Danish v. Choora Gazee*, S. D. 1851, p. 292, decided under the old law of limitation by the late Bengal Sudder Court, it was held to be unimportant whether, as laid down by some authorities, a claim for

* As to the cases to which the right of pre-emption is applicable, see *Wulee Sahoo v. Aantee-*

ram, 11 W. R. 251, and the decisions there cited.

pre-emption should under the Mahomedan law be brought within one month, or whether, as seemed to be the more authentic and general opinion, that law fixes no time within which such a claim should be made, since the law of Limitation positively enacted in Section 14, Regulation III of 1793, must be held to supersede the tenets of the Mahomedan law, and to fix a period of twelve years as the time within which the right must be asserted. In framing the Clause under notice, the Legislature indicated their opinion, that twelve years was too long a time to keep a purchaser in suspense, and that one month was too short a period within which to restrict the exercise of the right.

Under this Clause, a suit to enforce pre-emption must be brought within one year from the time when the purchaser takes possession under the sale sought to be impeached. No extension of time can be allowed on the ground that the party claiming the right of pre-emption has been litigating for possession of a share of the estate, his alleged title to which forms the basis of his claim to the right of pre-emption. *Shah Mohsun Ali v. Neknam Singh*, 6 W. R. 131.

In the case of *Lallun v. Hosseinnee Khanum*, W. R. 1864, p. 117, it was held that a defendant pleading limitation under this Clause, must show that he has been in possession for more than a year before the institution of the plaintiff's suit. The *onus* of proving possession was in this case thrown upon the defendant. But in the case of *Azmut Ali v. Kumur Ali*, 8 W. R. 383, in which the plaintiff sued to enforce a right of pre-emption in respect of certain lands, alleging that the defendant's deed of purchase of the said lands had been ante-dated, it was held that, under the circumstances, the *onus* lay with the plaintiff to prove that the defendant's deed of purchase had been ante-dated. Upon his failure to substantiate that allegation, and to show that the defendant had taken pos-

session within one year previous to the institution of the suit, the plaintiff's claim was held to be barred.

Where it appears that a contract has been entered into for the sale and purchase of lands, a plaintiff who seeks to enforce his right of pre-emption in respect of these lands, is not bound to delay the institution of his suit until such time as the deed of sale be delivered or registered, or payment of the price be made. *Bheemul Doss v. Luchmee Narain*, 8 W. R. 500.

A mortgage does not give occasion for the exercise of the right of pre-emption, since the mortgagor still remains, in the contemplation of law, the owner of the mortgaged property. The right of pre-emption does not arise until the seller's right of property has been completely extinguished, and cannot therefore arise where the seller has secured to himself any option or conditional power of dissolving the sale at a future time. Consequently, no right of pre-emption can accrue on a merely conditional sale, or mortgage, while any right of redemption remains in the mortgagor. *Gurudyal Mundur v. Teknarain Singh*, 2 W. R. 215; *Lalla Rughoobur Dyal v. Soondur Koor*, 10 W. R. 246.

As against a party claiming a right of pre-emption, oral evidence is not admissible to show that it was intended that a written deed, purporting to be a deed of absolute sale, should operate not as an absolute sale, but merely as a conditional sale. *Moolook Chand Surma v. Kooloo Chand Surma*, 5 W. R. 76.

It has been held that a party alleging a right of pre-emption in respect of property which is the subject of a conditional sale is bound to make his claim immediately on the expiry of the year of grace mentioned in the notice of foreclosure. *Syud Ameer Ali v. Bhabo Soonduree Dabea*, 6 W. R. 116. But where, after a suit for foreclosure has been brought by a mortgagee, an arrangement has been come to between him and the mortgagor, by

which a further period is allowed the latter for payment, no suit for pre-emption of the mortgaged property can be maintained during the pendency of such period. In such a case the ownership is still with the mortgagor, who can redeem at any time within the period given him. *Bhowanee Pershad v. Purshunno Singh*, 11 W. R. 282. In a suit to establish a right of pre-emption arising on the foreclosure of a mortgage, it appeared that the mortgagee had not taken possession under the foreclosure. It was contended for the defendant that as one year from the date of transfer of possession is prescribed as the time within which a suit for pre-emption may be brought, the plaintiff's suit ought not to have been brought until there had been a transfer of possession, and was therefore premature. But it was held that while a pre-emptor may sue at any time within one year from the transfer of possession, there is nothing to prevent his doing so earlier, since the right of the plaintiff to claim pre-emption must be taken to have accrued from the time when the sale became absolute. *Lekraanee Kooer v. Jankee Kooer*, W. R. 1864, p. 285.

In the case of *Beebee Fatima v. Gossain Gobind Pershad*, 2 W. R. 5, the defendant held certain lands under a conditional deed of sale. At the end of the term, notice of foreclosure was issued, and the year of grace having expired, the sale became absolute. As a third party was in actual possession of the land under a *zur-i-peshgee* lease, the defendant applied to have him ejected on payment of the amount due on his *zur-i-peshgee*. This application was granted and the defendant put in possession. The plaintiff thereupon claimed the right of pre-emption, and it was found that the legal preliminaries had been complied with. The defendant pleaded that the claim was barred, since it had not been preferred within one year from the date when he took possession. The Court of first instance held that the defendant's possession dated from the expiry of the year of grace, when the sale became absolute, but

the lower Court of appeal was of opinion that the law intended actual taking possession, and that as actual possession had not been obtained by the defendant until the ejectment of the party holding under the *sur-i-peshgee* lease, the plaintiff's claim was in time, having been made within a year from that date. On special appeal to the High Court, it was held that the words 'taken possession' in this Clause must be understood to mean an *actual* and not a merely *constructive* possession, and that a right of pre-emption must be enforced within a year from the time when the purchaser takes actual possession of the property in respect of which the right is claimed. It was observed that the object of the law is to give parties who have a right of pre-emption due notice of any transfer adverse to their interests, which can best be known by the fact of the new purchaser taking actual possession of his property, since if constructive possession were sufficient, it would be impossible for intending claimants to know of the existence of rights inimical to their own. But compare *Bechun v. Mahomed Yakool Khan*, 3 W. R. 225.

In the case of *Mahomed Hossein v. Mohsun Ali*, 7 W. R. 195, it was argued on the authority of the case of *Bee-bee Fatima*, that as the possession given under Section 264, Act VIII of 1859, is merely symbolical or constructive, it can have no effect as regards limitation in a suit for pre-emption. As it appeared, however, that the possession given had afterwards been set aside, the Court, without deciding what the general effect of possession under the Section referred to might be, held that in the particular case there had been no such possession as would give room for limitation to operate. In a later case, it was decided by a Division Court that possession by proclamation of sale under Section 264, Act VIII of 1859, where no actual possession was given, was no possession at all. *Ramchand v. Moonshee Jowher Ali*, 2 Ben. AP. 29.

It was held in one case that the right of pre-emption

accruing to a plaintiff during his minority does not remain suspended until his majority. *Meer Murtozah v. Lalla Nursingh*, 7 W. R. 86. But this decision is plainly wrong, and a contrary view has since been taken in the case of *Jungoo Lal v. Lalla Alum Chund*, 7 W. R. 279, in which it was observed that the words of Section 11 of the Act are perfectly general, and include cases under Clause 1, Section 1.

SECTION 1, CLAUSE 2.

To suits for pecuniary penalties or forfeitures
 Limitation of one for the breach of any Law or
 year. Regulation; to suits for dam-
 Suits for damages, ages for injury to the person
 summary suits, &c. and personal property, or to the reputation; to
 suits for damages for the infringement of copy-
 right or of any exclusive privilege; to suits to
 recover the wages of servants, artizans, or labor-
 ers, the amount of tavern bills or bills for board
 and lodging or lodging only; and to summary
 suits before the Revenue authorities under Reg-
 ulation V. 1822 of the Madras Code—the period
 of one year from the time the cause of action
 arose.

A SUIT under Section 3, Act X of 1836, for damages to the extent of the injury sustained, against a party who has induced ryots under contract with the plaintiff to cultivate indigo to break that contract, is not 'a suit for a pecuniary penalty or forfeiture,' within the meaning of this Clause, but is governed by the general rule of limitation provided by Clause 16, Section 1 of the Act.

Forbes v. Mir Mahomed Kazem, 5 W. R. 277 ; 7 W. R. 400 ; 8 W. R. 257.

Where a plaintiff, alleging that the defendants had entered his land, cut and carried away his growing crop of indigo plant, and converted and appropriated it to their own use, sued to recover the property so carried away and appropriated, or its value, and the defendants pleaded limitation under this Clause, it was held by a Full Bench of the Calcutta High Court that the plaintiff's suit was not a suit for damages for injury to personal property within the meaning of Clause 2, but was governed by the limitation prescribed in Clause 16 of this Section. *Saduk Mundul v. Watson*, W. R. sp. 126. A similar decision in respect of a suit for the recovery of the value of personal property plundered, and of other consequential damages, was pronounced in the case of *Huro Churn Pandah v. Shaikh Ahmedoollah*, 2 W. R. 235, in which reference was made to the case last cited, and to the case of *Juggobundhoo Dutt v. Maseyk*, W. R. 1864, p. 81, as clearly settling the rule of limitation to be applied. Compare *Ram Mohinee Dabca v. Dole Chunder Dey Sirkar*, W. R. 1864, p. 322 ; *Ramnath Roy Chowdhry v. Huro Chunder Roy Chowdhry*, 5 W. R. 50.

A similar view has been taken by the Madras High Court in the case of *Amirthammal v. Ranganadha Pillai*, 3 Mad. 165. In this case the defendant had carried away a quantity of unthreshed paddy from the plaintiff's threshing-floor. More than a year afterwards the plaintiff sued for the value thereof. The defendant pleaded limitation. The Court was of opinion that the word 'injury' as used in this Clause, could not be taken in its widest sense as '*omne id quod non jure fit*,' since then it would embrace every conceivable damage or harm caused by any wrong, even by a breach of contract. Nor could the word be used in its ordinary legal sense as equivalent to 'tort' or 'delict,' since there would then have been no occasion for the

separate enumeration of wrongs to the reputation, to copyright and exclusive privileges, and the word would naturally have been employed in the plural number. The Court observed :—"The wrong in the present case is a trespass in taking and carrying away goods. It would be impossible to extend the meaning of the words 'injury to personal property' so as to include such a wrong, without at the same time giving to them the full legal sense of tort. Moreover the phrase 'injury to personal property' does not accurately express the idea of a wrongful act by which a man is merely deprived of the possession of his property, the property itself remaining with the wrong-doer. Such an act would rather be an injury to the person in relation to personal property. We think, therefore, that the only meaning which can be given to the word, is the popular one of loss or deterioration caused by a wrongful act. The phrase will then mean some damage directly caused by some wrongful act to some particular article of property, not the diminution of the whole *corpus* of a man's property by abstracting or wrongfully detaining a portion of it. In this way only, as it seems to us, will the whole Clause be consistent and none of it superfluous. In confirmation of this view, we may notice the improbability that the Legislature should have included under the shortest period of limitation all suits for the recovery of personal property or its value. The result is that, in our opinion, Clause 2, Section 1, Act XIV of 1859, does not apply in the present case, and that the plaintiff is entitled under Clause 16 of Section 1, to a period of six years within which to bring his suit."

Wrongful seizure of goods under process of law is not an injury to personal property within the meaning of this Clause. *Inderchand Dogare v. Nundeeram Singh*, Coryton, p. 3. This was an action to recover damages for the wrongful seizure by the defendant, under an execution, of certain logs of timber the property of the plaintiff, who

alleged that partly owing to a fall in the market price, and partly to the exposure to the sun and immersion in water to which the timber had been subjected while under the seizure complained of, its value was greatly deteriorated. The defendant pleaded limitation under this Clause, as the seizure had taken place upwards of one year before the institution of the plaintiff's suit; but the Court, following the ruling in the case of *Saduk Mundul*, was of opinion that the plea of limitation relied on by the defendant could not be maintained.

Where A having obtained a collusive decree against B, a dependant of his own, seized, under legal process, certain articles of personal property belonging to C, and more than a year after the date of the seizure, C sued for their recovery, it was objected by A that the suit was barred under the provisions of this Clause, as a suit for damages for injury to personal property. But it was held that the claim was governed by the provisions of Clause 16, as being one for which no period of limitation was expressly prescribed. *Roop Sona Beebee v. Kasee Nusseutoollah*, 7 W. R. 499.

The uniform course of the decisions declaring the wrongful removal of personal property not to be an 'injury to personal property,' hardly leaves room for the suggestion of a doubt as to the correctness of the views above referred to. It has, however, been argued that as two classes of 'injury to rights of personal property in possession' are recognized by English jurists, namely, 1st, the amotion or deprivation of possession, and 2nd, the abuse or damage of the chattels while possession continues in the legal owner, it could not have been the intention of the Legislature in framing this Clause, to deal with the former class of injuries alone to the exclusion of the latter. It is, however, to be noted that the words 'injury to personal property' are not identical with the words 'injury to rights in personal property,' and that

strictly construed they may be taken to refer only to the "abuse or damage of chattels in possession." Looking at the reason of the thing there does not seem to be any good ground why the rule of limitation which the Clause provides, should have been laid down for the one class of injuries and not for the other. A, for example, wrongfully enters B's granary, destroys one half of the grain which it contains, and carries off the other half. It appears hardly reasonable that B should be bound to bring his action in respect of the grain destroyed within one year, while at the same time he has leave to sue for the value of the grain carried away at any time within six years from the date of its removal.

In the case of *Raj Chunder Ghose v. Joy Kishen Mookerjee*, 4 W. R. 76, the plaintiff sued for the value of paddy which might have been produced upon his land between the years 1267-1269, B. S., had not the defendant in the month of Falgoon, 1266, cut a water-course by which the land was overflowed, and the plaintiff prevented from sowing the usual crops. The defendant pleaded that as the suit was one for injury to personal property and had not been brought within one year from the time when the water-course in question was cut, at which time the plaintiff's cause of action must be taken to have arisen, it was barred by limitation. The Court of first instance considered that crops, the produce of land, did not come within the category of personal property to which this Clause applies, and that as the suit was for compensation for the produce of land, the same limitation was applicable as in a suit for land itself; and finding that the plaintiff had actually sustained the damage complained of, gave a decree in his favour. Upon appeal it was held by the lower appellate Court that the suit was for damages to crops, that crops are personal property, and, consequently, that the plaintiff's suit was barred in respect of the years 1267 and 1268; but, as

the cause of action was an annually recurring one, that the suit in respect to the crops of 1269, which was brought on the 29th Maugh, 1270, was in time, inasmuch as the cause of action must be taken to have arisen on the 1st Falgoon, 1269, when the plaintiff was prevented from sowing his crops for that year. On special appeal, the plaintiff urged that the estimated value of the future produce of land, for which he sought compensation, was not personal property so as to come within the meaning of this Clause, and that under the circumstances he was entitled to the same period for bringing his suit, as he would have been allowed in a claim for real property. The High Court was of opinion that as the Clause refers only to personal property strictly so called, it was not applicable to the claim. It was observed that the injury for which compensation was sought, was, in fact, the injury to the land, rendering it unable to produce certain crops, and thus causing it to be less profitable to the plaintiff than it would have been, had it not been injured by the defendant's act, and that an injury of this nature cannot be regarded as an injury to personal property. It was further remarked that the annual injury to the land would afford an annually recurring cause of action. The case was accordingly remanded for trial on the merits.

A suit to establish a prescriptive claim to irrigation from a running stream, and for damages caused through the stoppage of the water by the proprietors of lands higher up the stream erecting dams across it, is not governed by the limitation prescribed by this Clause, but by that applicable to suits for rights appertaining to real property, and for damages done to such property. *Shunker Doss v. Buddun Thakoor*, W. R. 1864, p. 106; *Oodoy-essuree Dabea v. Hurokishore Dutt*, 4 W. R. 107.

In a suit to recover damages for loss of produce occasioned by the defendant's interference with the plaintiff's right

to the flow of water from a canal, it was held by the Madras High Court that the claim was not for damages for injury to personal property within the meaning of Clause 2. The injury was not to personal property, but to an easement or incorporeal right attaching to real property; and as there is no express provision in the Act for a period of limitation in cases of injury to real property, the Court held that if the property injured remained in the possession of the party directly affected by the injury, the period of six years given by Clause 16, Section 1 of the Act would apply, but that the plaintiff's remedy would be lost if it were shewn that he had altogether ceased to have possession or enjoyment of the property for more than twelve years. It was further observed that an obstruction to a right of water such as was alleged, would be a continuing injury giving rise to a fresh cause of action as fresh damage resulted from it. *Viswambhara Rajendra Devu Garu v. Saradhi Charana Samantaraya Garu*, 3 Mad. 111. On the authority of the three preceding cases, however, it may be questioned whether in this case also twelve years from the time when the easement was interrupted should not have been held to be the period within which a party in possession might maintain a suit for damages.

A suit for damages arising out of the tortious act of the defendant, a servant of the plaintiff, in not making payment of a sum of money which had been entrusted to him for a particular purpose, is not an action for damages to personal property within the meaning of this Clause, nor does it fall under the provisions of Clause 9, but under those of Clause 16 of this Section. *Shaikh Amjud Ali v. Syud Ali Buksh*, 2 W. R. 122. Compare *Radhanath Dutt v. Gobind Chunder Chatterjee*, 4 W. R. s. c. 19.

In a suit for damages for injury to the reputation by the publication of a defamatory letter, the cause of action arises from the date of publication, and if the suit be not

instituted within one year from that time, it is barred by the provisions of this Clause. *Ameer Ali v. Mahomed Imdad Ali*, 2 Agra, 47. In the case of *Robert & Charriol v. Lombard*, 1 Ind. Jur. N. S. 192, PHEAR, J. said :—"The cause of action for injury to the reputation is complete once for all, when the defamatory matter is wrongfully published. If the party wronged is allowed to come into Court to vindicate his character the moment that it is aspersed, he cannot well be permitted again to come there for the same cause when time and circumstances have ripened the results into a more considerable or visible substance than was at first apparent or could have been anticipated." It would appear from the decision in this case, that limitation runs as regards damages for injury to the reputation, although the party wronged is not aware that he has been wronged. A in a letter to C, defames the character of B, who does not learn what has been written of him until more than a year from the time when A's letter was written and sent; B's time for bringing an action will have expired before he is aware that a cause of action has accrued.

In a suit for damages for injury to the reputation caused by a malicious prosecution in a Criminal Court, it has been held that the limitation prescribed by this Clause, must be taken to run from the date on which the plaintiff obtained his acquittal, and not from the time when the charge was preferred. *Obedul Hossein v. Goluck Chunder*, 8 W. R. 443. So, in the case of *Ismael Lubbay v. Abdool Rajak Lubbay*, 3 Mad. Jur. 377, in which the plaintiff sued for damages sustained through a malicious prosecution instituted by the defendant, it was held by the Madras High Court that until the charges brought against the plaintiff were dismissed, the alleged injury was not complete, so as to afford a cause of action for malicious prosecution. But in the case of *Ojoodhya Ram Sein v. Hurree Narain Mytee*, 10 W. R. 308, in which the plaintiff sought to recover damages resulting from a false and mali-

cious statement made by the defendant before a Magistrate in consequence of which criminal proceedings were taken against the plaintiff, it was held by a Division Bench of the Calcutta High Court, that the plaintiff's cause of action must be taken to have arisen from the time when the defendant made the statement complained of, and not from the time when the proceedings in the criminal investigation, which followed on the defendant's information, terminated in the plaintiff's acquittal and discharge.

Some doubt has arisen as to the meaning to be given to the word "servants" as used in this Clause. In the unreported case of *Kistomohun Roy v. Roop Chand Auddy*, decided on the 4th July, 1864, on a reference from the Calcutta Court of Small Causes, PETERSON, J. said:—"There is nothing in the Clause limiting its operation to domestic or menial servants. I cannot see how the words 'artizans or labourers' control or restrict the term 'servant,' or add the inference of 'menial' or 'domestic.' * * * I cannot understand that the word servants should be read otherwise than as applying to all those cases in which the relation of master and servant exists, whatever the nature of the employment. In my opinion the word 'servants' must apply to all those between whom and some other person, there subsists a contract for service in consideration of wages; for as the Act does not specify particular classes of servants, it must apply generally to all, whether the service be that of a syce or a sirkar, provided there be a hiring for wages for some stipulated time."

In the case of *Nitto Gopal Ghose v. Mackintosh*, 6 W. R. c. r. 11, the plaintiff sued for a balance of pay due to him as mookhtear of the defendant from April 1863, to June 1865, at the rate of fifteen rupees by the month. The suit was filed on the 11th April, 1866. The defendant pleaded that the plaintiff's claim for all pay due up to the end of March 1865, was barred by limitation. In disposing of this issue, the Judge of the lower Court said:—"By

Clause 2, Section 1, Act XIV of 1859, a period of one year from the time when the cause of action arose is applicable to all suit by *servants* for the recovery of their wages. If the word 'servants' in the Clause cited, means all kinds of servants, then the plaintiff would not be entitled to recover pay for that period which is more than a year from the date of the institution of his suit. But the circumstance of the word 'servants' being used in connection with the words 'artizans or labourers,' and the employment in the Clause of the word 'wages,' lead me to think that the Clause was not intended to include any other class of servants than the domestic or menial. The plaintiff being a mookhtear with the general powers of an agent for the defendant, his case I am of opinion is governed by Clause 16, Section 1 of the Act, which prescribes six years as the period of limitation." On a reference to the High Court it was certified that the view taken by the lower Court was correct, in so far as it had decided that the suit was not barred by the limitation of one year. But it was intimated that if there was an engagement of the plaintiff under a distinct contract to pay him at the rate of rupees fifteen by the month, the limitation provided in Clause 9, and not that laid down in Clause 16, Section 1 of the Act, would probably apply. Compare *Jumna Pershad v. Bheem Sein*, 1 Agra, MIS. 8. Similarly, it has been held that the word 'servant' as used in this Clause, applies to a servant *ejusdem generis* as 'labourer or artizan,' and that a claim for salary by a manager of a Company, does not fall within the provisions of this Clause, but is governed by the three years' limitation provided in Clause 9. *MacLardy's case*, 2 Ind. Jur. N. S. 181. A tehsildar has similarly been held not to be a servant within the meaning of this Clause. *Oroon Chunder Mundul v. Romannath Rukheet*, 10 W. R. 260. As to the wages of a gomastah of an indigo factory, see *Nobin Chunder Mozoomdar v. Kenny*, 5 W. R. S. C. 3.

Where it was verbally agreed between A and B that in consideration of the possession and use of B's land and of a third of the produce thereof, A should provide seed and labour, and cultivate the land, and A subsequently sued B for his share of the produce due under the above agreement, it was held by the Madras High Court that under their agreement, the parties stood towards one another in a very different relationship from that of employer and labourer, and that the period of limitation applicable to the suit was that of three years under Clause 9, and not of one year under Clause 2. *Andi Konan v. Venkata Subbaiyan*, 2 Mad. 387.

Where a servant is appointed on a fixed monthly salary, and there is no evidence to show that the salary is to be paid in advance, limitation as regards each month's pay must be taken to run from the time when it presumably became due, that is, from the end of each month. *Kalichurn Mitter v. Mahomed Soleem*, 6 W. R. C. R. 33.

The Clause applies only to suits for wages brought by a servant against the person liable as master in whose service he has been employed. It cannot be taken to bar a suit brought by one Government servant against another for the recovery of a sum of public money received by the latter as a disbursement on account of the wages of the former to whom he was legally bound to pay it over. *Siva Rama Pillai v. Turnbull*, 4 Mad. 43.

Regulation V of 1822, of the Madras Code, referred to in this Clause, confers upon the Collectors of the revenue in that Presidency, authority to take primary cognizance of claims to property distrained by landholders to enforce payment of their rent, and of questions arising between proprietors and cultivators respecting agreements for the occupation of lands. It also confers summary jurisdiction in cases of sudden and violent disputes respecting the occupancy, cultivation and irrigation of land.

SECTION 1, CLAUSE 3.

To suits to set aside the sale of any property, Limitation of one moveable or immoveable, sold year. under an execution of a decree of any Civil Court not established by Royal Charter for arrears of Government Revenue, &c. when such suit is maintainable ; to suits to set aside the sale of any property, moveable or immoveable, for arrears of Government Revenue or other demand recoverable in like manner ; to suits by a Putneedar or the proprietor of any other intermediate tenure saleable for current arrears of rent or other person claiming under him, to set aside the sale of any Putnee Talook or such other tenure sold for current arrears of rent ; to suits to set aside the sale of any property, moveable or immoveable, sold in pursuance of any decree or order of a Collector or other Officer of Revenue—the period of one year from the date at which such sale was confirmed or would otherwise have become final and conclusive if no such suit had been brought.

WHERE a suit is brought not to set aside a sale in execution of a decree, either on the ground of irregularity or of other matters relating to the sale itself, but to invalidate certain deeds under colour of which the sale was brought about, as having been collusive and fraudulent, the provisions of this Clause will not apply. If the plaintiff in such a case prove his allegations of

fraud, the sale in execution may stand as a sale of the rights and interests conveyed. But the rights and interests conveyed will in fact be *nil*, and consequently the purchaser at the execution sale will have taken nothing under his purchase. *Kishen Bullub Mahatab v. Roghoo Nundun Thakoor*, 6 W. R. 305.

Section 246 of Act VIII of 1859, regulates the investigation of claims and objections to the sale of property attached in execution of the decrees of Civil Courts, and provides that the order which may be passed by a Court after such investigation, shall not be subject to appeal, but that the party against whom the order may be given shall be at liberty to bring a suit to establish his right at any time within one year from the date of the order. It will be seen that this rule of limitation, and the rule provided by the Clause under notice, are not identical. Section 246 of Act VIII, fixes one year from the date of the order pronounced by the Court under that Section as the period within which the party against whom the order has been passed may sue to set it aside. The Clause under notice prescribes a period of one year from the date when the sale in execution of a decree is confirmed, as the time within which a suit to set aside the sale may be brought. As the confirmation of an execution sale may not take place until some time after the date of an order passed under Section 246 rejecting a claim made to property seized in execution, it may happen that a suit to set aside the sale which would be in time under the provisions of this Clause, as brought within one year from the date of the confirmation of the sale, will, nevertheless, not be in time under the provisions of Section 246, as not brought within one year from the date of the Court's order under that Section. This difference in the terms of the two enactments has been noticed by the Madras High Court in the case of *Settiappan v. Sarat Singh*, 3 Mad. 220. In this case the plaintiff had, under

Section 246, claimed certain lands attached in execution, and his claim had been rejected. More than a year after the order of rejection, but within a year from the time when the sale of the lands was confirmed, he instituted a suit against the auction purchaser for recovery of possession, contending that under this Clause his suit was in time. But the Court held that the suit was barred. It was observed that the Clause only applies 'when the suit is maintainable,' and that a suit brought by a claimant whose claim has been enquired into and rejected under Section 246 of Act VIII of 1859, cannot be maintained unless brought within one year from the date of the order of the Court rejecting the claim. It was further remarked that there could be little or no doubt that an order under Section 246 of Act VIII, is one of those orders referred to in Clause 5 of Act XIV of 1859.

Section 247 of Act VIII of 1859, directs that where such claims and objections as might be competently brought under Section 246 of that Act, are designedly and unnecessarily delayed, they shall not be entertained by the Court. Where a claim to property about to be sold in execution of a decree was made under Section 246, and investigation into the claim was refused under Section 247, it was held that the claimant in bringing a regular suit, was not restricted by the terms of Section 246, to institute such suit within one year from the date of the order disallowing the investigation. These two Sections, it was said, cannot be read together to the effect of imposing the same period of limitation in cases where investigation is refused, as is provided in cases where it is allowed, since a claim which has been enquired into and decided stands in a different position from one in which the Court has refused to make any enquiry, or pass any decision. *Syed Mahomed Afzul v. Kanhya Lal*, 2 W. R. 263; *Sreemutty Dossee v. Sheebanee Dabee*, 5 W. R. 123; but compare, *Purmonund Dutt v. Shaikh Khoda Buksh*, 5

W. R. 213. In the case of *Syed Mahomed Afzul*, it was also held, that inasmuch as the plaintiff did not sue either to set aside the sale, or the order made under Section 247 of Act VIII, neither Clause 3, nor Clause 5, Section 1, Act XIV of 1859 could be applied.

The rule of limitation prescribed by Section 246 of Act VIII of 1859 has no retrospective effect, and consequently cannot be applied to orders passed for the sale of attached property prior to the time when the Act came into operation. *Sreenath Roy v. Dwarkanath Roy*, W. R. 1864, p. 237; *Lokun Singh v. Deo Narain Singh*, 3 W. R. 62; *Muddun Mohun Tewaree v. Joykoomaree Beebee*, 6 W. R. 296; *Kalee Mohun Paul v. Bholanath Chakladar*, 7 W. R. 138; *Gokool Ram Deb v. Ram Soondur Surma*, 9 W. R. 292. A having obtained a decree against B, attached certain lands, as the property of his judgment-debtor. C, the brother of B, claimed a right in the attached lands and asked for their release. The claim was rejected, C was referred to a regular suit, and the lands were sold in execution of A's decree. The sale took place in 1858. In 1861, C instituted a suit against the auction purchaser for recovery of possession. It was pleaded that he was out of time under the provisions of Section 246 of Act VIII of 1859; but the Court held that as the order for the sale of the property had been made before that Act was passed, it could not be said to be an order under the Section referred to, and consequently was not subject to the limitation provided by that Section. *Venkatanaru v. Akkamma*, 3 Mad. 139. It was further observed in this case that the limitation prescribed by Section 246 of Act VIII, is only applicable in cases in which the procedure provided by that Section has been adopted.

Where a claim to certain lands attached in execution was not rejected,—the Court making no enquiry and pronouncing no decision as to whether or not the lands were in the possession of the party against whom execution was

sought, as his own property, but simply directing the sale to proceed subject to the claim made,—it was held by the Calcutta High Court that a suit by the claimant to establish his right to the lands, might under Clause 12, Section 1, Act XIV of 1859, be brought at any time within twelve years from the date of his dispossession. It was observed that in such a case there was no legal order or decision under Section 246 of Act VIII, which bound or affected the plaintiff, or which he was under any necessity to set aside, and that the Clause under notice did not apply to the case, since as the plaintiff was no party to the decree he could not be affected by the sale which was only of the interest which the judgment-debtor possessed in the lands. *Athuroonnissa v. Rughoonath Banerjee*, W. R. 1864, p. 322; *Troyluckhonath Ghose v. Monohur Khan*, 4 W. R. 35; *Majeda Beebee v. Rutnessur Koondoo*, 7 W. R. 252; *Raja Nursingh Deb v. Doorgaram Roy*, 11 W. R. 134.

Where no claim has been made to property attached in execution of a decree, and the attached property has been sold, and the purchaser is resisted or obstructed in obtaining possession, it is provided by Section 269 of Act VIII of 1859, that if such resistance or obstruction shall have been occasioned by any one, other than the defendant, claiming right to the possession of the property sold as proprietor or under any other title, or if in delivery of possession to the purchaser, any person so claiming shall be dispossessed, the Court on the complaint of the purchaser, or of such claimant, if made within one month from the date of such resistance or obstruction, or of such dispossession, shall enquire into the matter of the complaint, and pass such order as may be proper in the circumstances of the case, which order shall not be subject to appeal, but the party against whom it is given, shall be at liberty to bring a suit to establish his right at any time within one year from the date thereof.

There have been conflicting decisions as to what rule of limitation applies where a party dispossessed under a sale in execution of a decree makes no 'complaint' under Section 269 of Act VIII, within a month from the date of dispossession, but subsequently sues, not to set aside the sale, but to have his rights declared and for recovery of possession. In the case of *Golam Nujee v. Beebee Suboorun*, 2 W. R. 55, STEER, J., observed that where a purchaser at an execution sale has applied to the Civil Court to be put into possession, under Section 264 of Act VIII, of the purchased property, and has through the intervention of the Court acting under the provisions of that Section actually obtained possession, and has ousted a party who had before been in possession, the latter is bound, if he desires to establish his title to the property from which he has been dispossessed, to bring his suit within one year from the date of the Court's order giving delivery of possession to the purchaser. He further observed that "a party dispossessed, or sought to be dispossessed under a sale in execution of a decree has a right under the provisions of Section 269, Act VIII of 1859, to ask for the protection of the Court to restrain the purchaser from dispossessing him; but if his opposition be set aside and the purchaser be put into possession, he must bring his regular suit to establish his title to the property from which he is dispossessed, within one year from the date of the order by which he is dispossessed. If a claimant who resists the entry of a purchaser into property which the purchaser alleges he has bought under a decree, must, upon the Court's deciding that he has no right to resist, bring his suit within a period of one year, so, *a fortiori*, must a party who stands by and allows the purchaser without resistance to take possession of his purchase. For although Section 264, Act VIII. of 1859, does not say that a party ousted by an order of delivery passed by the Civil Court, must

sue for the establishment of his title within one year from the date of dispossession under the Court's orders ; still, a party who tacitly permits himself to be put out of possession cannot be in a better position as regards the time when he ought to bring his suit to recover possession, than he who openly, though unsuccessfully, resists the right of the purchaser to deprive him of possession."

In the case of *Ramgopal Roy v. Nundogopal Roy*, 4 W. R. 42, the plaintiff sued to set aside a sale of land in execution of a decree, so far as regarded the plaintiff's share. It appeared that he had notice of, and was by his own admission dispossessed under colour of the sale which purported to be a sale of the property of the judgment-debtor. He sued expressly to set aside the sale, and it having been found that more than a year had elapsed from the date of the sale, the suit was dismissed by the lower Court as barred by limitation. From this decision, the plaintiff appealed on the ground that his suing to set aside the sale was a mere verbal error, and urged that as in reality only the rights of the judgment-debtor had been sold, there was no occasion to set aside the sale, since all that he claimed was his own share of the property. The Court, TREVOR and CAMPBELL, JJ. in giving judgment, expressed themselves to the following effect. "The question is whether a man dispossessed by a Court under a sale in execution of a decree must sue within one year to reverse the sale proceedings, or whether he can, under the ordinary law, sue for possession of the property any time within twelve years from the accrual of his cause of action. The object of the law is to give security to titles, by providing that a man who wishes to dispute the acts of the Court must sue within one year. The test to be applied, therefore, is, was or was not the act of the Court the cause of the plaintiff's action. We think, that if it be shown that in fact the property was actually taken, and the plaintiff dispossessed by the Court, whether the

Court was right or wrong, the injured party must sue within one year; but if this be not shewn, if according to the old loose practice a mere nominal and not a real possession was given,—as, for example, if the plaintiff was out of possession and not injured by the act of the Court,—or if again the purchaser otherwise than through the Court dispossessed the plaintiff,—then the plaintiff may, under the ordinary law, sue at any time within twelve years from the date when his cause of action, whatever that may be, arose, since under such circumstances, the sale, or any dispossession by the Court, under the sale, is not the cause of action.”

The views set forth in the last two cases cited, were considered by a Full Bench in the case of *Pertab Chunder Choudhry v. Brojolall Shaha*, 7 W. R. 253. In this case it appeared that the right and interest of A, a judgment-debtor, in certain lands, had been sold in execution of a decree. In granting a certificate of the sale under Section 259, Act VIII of 1859, it was erroneously recited that the right and interest of B, as well as of A, had been sold under the decree, and in giving possession under Section 264, notice was given to the occupants of the lands that the right and interest both of A and B had been transferred to the purchaser. B did not at once under Section 269 of Act VIII, seek to dispute the sale but subsequently brought a suit for confirmation of his title, and to recover possession of the lands from which he had been dispossessed. It was contended for the defendant that the plaintiff's suit, although not formally brought to set aside the sale of his right and interest in the property, was substantially brought for that purpose, since he could not be put into possession until the sale was set aside, and that, as the suit had not been brought within one year from the date of the proceedings under Section 264, Act VIII of 1859, it was barred by the provisions of Section 269 of that Act, and also by the terms of the Clause under notice. But it was held

that as the Clause applies only to suits to set aside sales, and not to suits for setting aside certificates of sales, and as, in fact, although the certificate stated otherwise, the right and interest of A alone in the lands had been sold, it was competent for the plaintiff in a regular suit for confirmation of title and recovery of possession, to show what the sale really was, and that the certificate was erroneous; and that the period of limitation for such a suit was twelve years under Clause 12, Section 1 of the Limitation Act. With reference to the plea that the suit was barred under Section 269 of Act VIII the Court observed:—"It is contended on behalf of the defendant that, according to the decision of Mr. Justice Steer in the case of *Sheikh Golam Nujee*, the plaintiff had no right, when he was dispossessed by the notice given to the ryots that his interest had been sold, to lie by, and that he ought, under Section 269, Act VIII of 1859, to have complained of his dispossession to the Court by which the decree was executed; and that if he did not do so, he would only have the same period from the date of dispossession to bring his action as he would have had under that Section from the date of the order if he had complained under that Section, and the Court had decided against him, *i. e.*, one year. We are of opinion, that the plaintiff was not bound to complain under that Section. If he was bound to complain, and has only the same time to bring his suit as he would have had if he had made his complaint, the period of limitation would seem to be one month from the date of dispossession, for Section 269 requires the person who is dispossessed, if he intends to make a complaint, to make that complaint within one month from the date of his having been dispossessed. Mr. Justice Steer does not say that he would be bound by the period of one month, but by the period of one year from the time of his dispossession. The period of one year fixed by Section 269, is not to date from

the time of dispossession, but from the time of the order made upon the complaint. Where no complaint is made, there can be no order, and it would be impossible to ascertain whether the suit was brought within one year from the time at which the order would have been made, if a complaint had been preferred; and there is no reason for saying that if there is no order from which the year is to date, the period of one year must be reckoned from the date of the dispossession, instead of from the date of the order, which, if a complaint had been made, must have been subsequent to the dispossession, and in some cases a considerable time after it. It therefore appears to us that to this extent the ruling of Mr. Justice Steer is not correct, and that a party is not bound to make an application under Section 269, unless he pleases. If he chooses to make an application, and a decision against him is passed upon that application, he is not entitled to appeal against the order; but if he does not choose to apply to the Court which is executing the decree for a summary decision, but prefers to bring a regular suit in ordinary course, then the period of limitation prescribed by Clause 12, Section 1, Act XIV of 1859 is the period by which he is bound." With reference to the decision of **TREVOR and CAMPBELL, JJ.** in the case of *Ramgopal Roy*, the Court further observed that "all that that case decided was, that when a man is dispossessed by a Court under a sale in execution of a decree, he must sue within one year to reverse the sale proceedings. The facts of that particular case are not sufficiently detailed to enable the Court to say precisely what was intended. If a person makes an application under Section 269 of Act VIII, and the Court in which his application is made, decides against him by holding that he was properly dispossessed, that may be said to be a dispossession by the Court, and if that was what was meant by a dispossession in the case referred to, then the decision was right. But the case would not fall within Clause 3 of

Section 1 of Act XIV of 1859, but within Section 269 of Act VIII of 1859." To the same effect, see also *Jodoonath Chowdhry v. Radhamonee Dossee*, 7 W. R. 256.

In accordance with these views, it has been held in the more recent case of *Kripanath Roy v. Nitokalee Dabea*, 8 W. R. 358, that a third party is not bound by any law to come forward and urge his claim to lands advertised for sale in execution of a decree. Nor is it obligatory on him to sue for recovery of possession, within one year from the date of the delivery of possession to the auction purchaser. Compare *Radha Koonwar v. Janokee Koonwar*, 9 W. R. 199; *Gunganarain Behutta v. The Collector of Midnapore*, 6 W. R. 47; *Kinoo Doss v. Roghoonath Doss*, 4 W. R. 34.

A mortgagee's right or lien is not affected by an execution sale of the rights and interests of the mortgagor in the property mortgaged, and the limitation provided by this Clause will consequently not apply to a suit brought by the mortgagee to enforce his mortgage lien against the auction purchaser. *Roushun Singh v. Rai Purdimun Kishen*, 1 Agra, 111. An attachment of certain lands having been made in execution of a decree for rent, A intervened, claiming the lands attached as having been mortgaged to himself. He was directed by the Collector to bring his claim, if he had any, under Section 269 of Act VIII, which, however, he failed to do. The sale of the lands having taken place, and the auction purchaser having entered into possession, A brought a regular suit to establish the validity of his mortgage. It was contended for the defendant, that the suit was barred, as not brought within one year from the date of the Collector's order rejecting A's claim. But the plea was overruled. The Court said:—"We do not think that this suit is barred. The Collector passed no order upon the plaintiff's petition before the sale took place, but told him to proceed under Section 269 of Act VIII, after the sale

had taken place, should his possession be disturbed by the auction purchaser. The plaintiff made no opposition under that Section. He was not bound to do so, and his omission to do so, does not bar his right to bring the present suit, within the period permitted by Act XIV of 1859 for the institution of suits of this nature. Had he filed an objection under the said Section, and it had been adjudicated upon, he would have been bound to have brought a suit to set aside the order within a year from its date. But in the absence of any such adjudication, the time for bringing the suit is not limited to one year." *Radhanath Bannerjee v. Jodoonath Singh*, 7 W. R. 441.

The ruling of the Bombay High Court in the case of *Krishnaji Vishvanath Josi v. Mukund Chimanshet*, 2 Bom. 19, was opposed to the views expressed by the Full Bench of the Calcutta High Court in the case of *Pertab Chunder Chowdhry* above cited. Separate judgments had been obtained by A and B against C. Certain lands belonging to C were attached and sold at the instance of A in execution of his decree, and were purchased by D who thereupon took possession. The same lands were afterwards sold in execution at the instance of B, the other decreeholder, and were purchased by E, who then obtained possession, dispossessing D. In a suit by D against E for recovery of possession, the defendant pleaded that as the suit was not instituted within one year from the date of the dispossession, it was barred under this Clause. The plea was held good. In giving judgment, the Court said:—"The question is whether the suit, *being to set aside a sale*, comes within Clause 3, or Clause 12 of Section 1, Act XIV of 1859. In construing the provisions of the Limitation Act, we must look to those of Act VIII of 1859. Sections 246 and 247 of that Act prescribe how and when claims and objections to sales of attached property are to be made and investigated. The time limited by the latter part

of Section 246 for a person whose claim under that Section has been disallowed, to bring a suit to establish his right, is the period of one year from the date of the order passed by the Court under that Section. In the present case the plaintiff has not followed the course prescribed in Section 246, but he was at liberty under Clause 3, Section 1, Act XIV of 1859, to bring his suit within one year from the date of sale. We are of opinion that the present is a suit to enforce the same right which would be enforced by the suit referred to in Section 246 of Act VIII. We must construe the Acts *in pari materia*. We cannot therefore do otherwise than come to the conclusion that the present suit falls within the provision in Clause 3, Section 1, Act XIV of 1859, and ought to have been brought within one year. That being so, and because there is thus a special provision of the Act applicable to the case, we hold that Clause 12, Section 1, Act XIV of 1859 does not apply. There is another reason for coming to this conclusion. The sale under a decree is an important matter. It has greater effect than an ordinary sale, and the Legislature may have thought that a shorter period ought to be allowed for impeaching it."

But this decision has been expressly overruled by the same Court in the more recent case of *Lalchand Ambai-das v. Shakharam valad Chandrabhai*, 5 Bom. A. C. 139. In this case the plaintiff's tenant had been ejected from a shop belonging to the plaintiff, under a sale in execution against a third party. The plaintiff made no application to the Court either under Section 246 or 269 of Act VIII to prevent or to set aside the sale. It was held by the Bombay High Court, that he was not bound to do so, but was entitled, under Clause 12, Section 1 of the Limitation Act, to bring a regular suit to establish his title, and recover possession, at any time within twelve years from the date of the dispossession. The Court observed :—"Clause 3 of Section 1 of Act XIV of 1859 is

in terms applicable only to suits to set aside the sale, and the concluding words appear to show that it should be construed strictly. They are—‘the period of one year from the date at which such sale was confirmed, or would otherwise have become final or conclusive if no such suit had been brought.’ These words are inapplicable to a suit where the dispossession is the cause of action, and it may not have taken place till some time after the sale was confirmed. They seem to refer to a suit by a party to the suit in which the execution issued, or by the purchaser, who are bound by the confirmation of the sale, and not to a suit by a person not bound by it; and although, looking at Sections 256 and 257 of Act VIII of 1859, suits of the former description are likely to be rarely brought, they may sometimes occur. When we decided the case of *Krishnaji Vishwanath Josi*, we thought it was not the intention of the Legislature to provide for these cases by Clause 3, Section 1 of Act XIV of 1859, and that suits to recover property the title of the defendant to which rested upon a sale in execution of a decree, and where the sale, though not in form sought to be set aside, was sought to be rendered totally inoperative, were contemplated; and in coming to this conclusion, we were influenced by a consideration of the means afforded by Act VIII of 1859 for determining whether the property was liable to be sold in execution of the decree, and of the diminution of price which must arise from the uncertainty of the title, and the possibility of the property being claimed by a third person at any time within twelve years from the taking possession under the sale. We are now, however, of opinion that this conclusion cannot be supported, and that the decision must be considered as overruled.”

As to the limitation to be applied in a suit by a reversioner to set aside a sale in execution of a decree against a Hindoo widow in possession of the estate of her deceased

husband, reference may be made to the cases of *Doorga Churn v. Kassee Chunder Moitree*, 2 Hay, 646; *Ramlall Sirkar v. Greesh Chunder Lahoree*, 1 W. R. 145; *Mohendronath Bose v. Syud Ameer Ali*, 2 W. R. 271.

Sales of land for arrears of Government revenue were formerly regulated by Act I of 1845, under Section 24 of which it was provided that suits to set aside such sales should be brought within one year from the date when the sale would otherwise have become final. Act I of 1845 was repealed, but re-enacted with modifications, by Act XI of 1859. Section 33 of the latter Act allows a period of one year from the time when the sale becomes final under Section 27 of the Act, for bringing a suit to annul a sale made under the Act. The sale of moveable property for arrears of Government revenue is provided for by Section 44, Regulation XIV of 1793.

Where a subordinate tenure is sold in satisfaction of a decree, it has been held that a suit to set aside the sale must under this Clause be brought within one year from the date of the confirmation of the sale, and that no exemption from the rule of limitation can be allowed under Sections 9 and 10 of the Act, in favour of a party who without alleging that he was fraudulently kept in ignorance, pleads that he was not aware that the sale had taken place. *Rajkissen Mookerjee v. Gossain Dass Shaha*, 1 W. R. 213.

SECTION 1, CLAUSE 4.

<p>Limitation of one year.</p> <p>Suits to set aside attachments, &c., by Revenue Authorities for arrears of Government Revenue.</p>	<p>transfer of any land or interest in land by the Revenue Authorities for arrears of Government Revenue, or</p>
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to recover any money paid under protest in satisfaction of any claim made by the Revenue Authorities on account of arrears of revenue or demands recoverable as arrears of revenue—one year from the date of such attachment, lease, or transfer, or of such payment as the case may be.

THE suits intended by this Clause appear to be suits brought directly against the Government. Where money deposited under Section 15, Act XI of 1859 by A, a co-sharer in a joint estate, to protect the estate from sale, has been applied by the Collector in payment of revenue falling due by B, another co-sharer, in respect of his share of the estate, a suit by A against B for reimbursement is not governed by the limitation provided in this Clause. *Boykuntnauth Bhooya v. Ramnauth Bhooya*, 4 W. R. s. c. 9.

A judgment-creditor having seized certain lands in Chota Nagpore in execution of a decree, A appeared and claimed them as his. He established his right, and the property was ordered to be released. As, however, it appeared to the Deputy Commissioner that a smaller amount of revenue was being paid to Government for the lands in question than was legally payable, he passed an order, that from the date of the attachment of the lands, A should pay the Government revenue at a higher rate. A being dissatisfied with this order, appealed to the Commissioner, by whom, on the 25th April, 1861, the order was confirmed. From that time, A paid the Government revenue at the higher rate. But on the 5th July, 1864, he instituted a suit to set aside the order of the Commissioner, and to recover the money paid by him in compliance therewith, in excess of the rate at which he had previously paid. The lower Courts,

considering the suit to be one for the recovery of money paid under protest in satisfaction of a claim made by the Revenue Authorities within the meaning of the Clause under notice, held that the plaintiff's claim was barred as not having being brought within one year from the date of such payment. On appeal to the High Court, SETON-KARR, J., was of opinion that although there was nothing to show that at the time of tendering the payment in each year a formal protest was made by the plaintiff, still the objection originally made to the Deputy Commissioner against payment, and the subsequent infructuous appeal to the Commissioner must be taken as equivalent to a protest. He observed that "an appeal to the higher authority set over the authority which disallows any request, is a native's way of protesting. It is his mode of attempting to vindicate his rights, and what he does when the attempt has failed may be said, looking to native modes of thought and action, to be done under protest." Recognizing the plaintiff's payments to have been made under protest, the learned Judge was of opinion that the plaintiff could only recover the money so paid for one year previous to suit, but that he might sue to set aside the order of the Revenue Authorities of which he complained, and be allowed six years under Clause 16, Section 1, Act XIV of 1859, for bringing his suit, no specific period of limitation having been provided for a suit of that nature. MACPHERSON, J., concurred in the view that the plaintiffs' suit to set aside the order complained of, might be brought at any time within six years from the date of the order; but was of opinion that no part of the claim for the recovery of the revenue paid in excess of the amount admitted to be due could be maintained, on the general principle that a suit will not lie to recover money paid *to* a person who has committed no fraud or extortion, and *by* a person fully aware of all the facts and grounds on which the money was paid. He observed:—"Although

this money has been paid in satisfaction of a claim made by the Revenue Authorities on account of revenue, it has not, in my opinion, been paid under protest within the meaning of Clause 4, Section 1, Act XIV of 1859. The appeal to the Commissioner is the latest indication on the record of any protest, and I do not understand on what principle it can be held that money paid annually for three years after an order has been made by the Revenue Authorities, can be said to be money paid under protest, when there is no evidence of actual protest, and when the suit brought more than three years afterwards to set aside the order complained of, might have been instituted the day after that order was made." *Kebul Ram v. The Government*, 5 W. R. 47.

SECTION 1, CLAUSE 5.

To suits to alter or set aside summary decisions and orders of any of the Civil Courts not established by Royal Charter, when such suit is maintainable—the period of one year from the date of the final decision, award, or order in the case.

Limitation of one year.
Suits to set aside summary decisions, &c.

THE 'final decision, award, or order in the case' intended by this Clause, is the final decision, award, or order of a Court having competent jurisdiction to determine the case finally. Where a Court having competent jurisdiction has passed an order against which the law allows no appeal, limitation will run from the date of such order, and not from the date of the order of a superior Court, declaring that no appeal will lie. *Oleemonnissa v. Buldeo Narain Singh*, 7 W. R. 151.

It has been held that this Clause applies to suits to set aside summary orders passed in execution, before Acts VIII. and XIV of 1859 were enacted. *Ahsan Ali v. Basit Ali*, 2 Agra, 198. Certain lands having been attached under a decree, A, a third party, claimed them as his, under a deed of sale. The Court enquired into his claim, and finding the assignment to be fraudulent, ordered the property to be sold under the decree. A suit was thereafter instituted by A to set aside the sale. It was contended that as the adjudication in the execution proceedings had taken place before Act VIII of 1859 was passed, these proceedings must be held to be governed by the law then existing, under which the only question for the Court to determine was, whether the judgment-debtor was, or was not, in the actual or virtual possession of the property in dispute, and which conferred no right to deal with any question of title arising in the case, except for the purpose, and to the extent of deciding that notwithstanding the claim made, the sale should proceed. And it was argued that as nothing was conveyed to the purchaser or guaranteed to him by the sale beyond the rights and interests of the party bound by the original decree, the suit should be regarded simply as a suit for the recovery of immoveable property, and so governed by the ordinary twelve years rule of limitation. The High Court, however, decided that the order of the Judge was a summary decision within the meaning of this Clause, and that A's suit, not having been brought within one year from the date of that order, was barred. *Shaikh Khyrut Ali v. Khurruck Dharee Singh*, Marsh. 520.

A, a decree-holder, applied for the attachment of certain lands in execution of his decree, as being the property of his judgment-debtor. On objection by B, a third party, an order was passed under Section 246 of Act VIII releasing the lands from attachment. It was held that whether the order was rightly or wrongly made by

the Court, it was binding upon A, who must bring a regular suit to establish his right within one year from the date of the order. *Juggoo Lal Upadhyya v. Ekbaloonnissa*, 7 W. R. 456. Compare *Purmanund Dutt v. Shaikh Khoda Buksh*, 5 W. R. 214.

When, under Section 246, Act VIII of 1859, property which has been attached is ordered to be released, the order is made with reference merely to the particular claimant who has obtained the order. It is not to be regarded as a general decision that the property does not belong to the judgment-debtor, by which parties who were not before the Court when the order was passed can be bound. *Inam Bandi Begum v. Mahomed Khan*, 8 W. R. 27. A holding a decree against B, attached certain lands as the property of B. C claimed the lands as his, and they were released to him by an order passed under Section 246 of Act VIII. Subsequently, B brought a suit against C to have his right to the lands declared. It was held by the Court of first instance that B was bound by the order passed under Section 246, and ought therefore to have brought his suit within a year from the date of that order. But the High Court was of opinion that as the order was not made as between B and C, but only as between A and C, B's rights could not be affected by it, and that he was consequently entitled to bring his suit within the ordinary period of limitation. *Nitta Kolita v. Bishnuram Kolita*, 2 Ben. AP. 49.

Certain lands having been attached by A in execution of a decree against B, C under Section 246 of Act VIII, claimed them as his, and obtained an order for their release. Subsequently, B sold the same lands to D, who, thereupon, sued C for possession. D's suit not being brought within one year from the date of the order for the release of the lands, it was pleaded that the claim was barred by the provisions of Section 246 of Act VIII, and

by this Clause. But it was held by the High Court that under Section 246, the Court executing the decree could not decide any question of title between C, the claimant, and B, the judgment-debtor; consequently that B, and D claiming through B, were in no way affected or bound by the order passed for the release of the lands, except in so far as the conduct of B in keeping quiet, and allowing the property to be released on C's application without opposition, might afford evidence against him and against D claiming through him. It was further held that as the suit was not in fact brought to alter or set aside the order passed under Section 246, neither the provisions of that Section nor those of Clause 5, Section 1 of the Limitation Act were applicable to the case. *Bhyrub Lall Bhukut v. Meer Abdool Hossein*, 8 W. R. 93.

Where the rights and interests of one of three brothers of a joint and undivided Hindoo family had been sold in execution of a decree obtained against him personally, a suit brought by the other two brothers, not to set aside the order under which the sale took place, but to recover possession of their share of the joint estate, the whole of which had been taken by the purchaser at the execution sale, was held not to be barred by the provisions of this Clause, or of Section 246, Act VIII of 1859. *Lalla Beharee Lal v. Lalla Modho Pershad*, 6 W. R. 69; *Athur-oonnissa v. Rughoonath Bannerjee*, W. R. 1864, p. 322.

On attachment of certain property in execution of a decree obtained by A against B, C and D intervened, each separately claiming the property as his. C's claim was rejected, and the property was ordered to be sold; but D's claim was admitted, and the property was released in his favour. After the lapse of more than a year from the date of the order disallowing his claim, C sued D for recovery of the property. D pleaded limitation. On appeal to the High Court, it was held by L. S. JACKSON, J., that as after making the order rejecting C's claim, the Court did not

go on to sell the property, the order of the Court was not a binding order as between C, the claimant, and A, the execution creditor, and decided no question of right between C and D the other claimant, and that, therefore, C was not bound by it so as to be obliged to bring his suit to set it aside within one year. The correctness of this view seems to have been doubted by MARKBY, J., who, however, referring to the terms of the orders passed by the Court in dealing with the two claims, was of opinion that C's claim had not, in fact, been enquired into, and consequently that the limitation of one year was not applicable to the case. *Rajah Nursingh Deb v. Doorgaram Roy*, 11 W. R. 134. Compare the cases cited *supra*, p. 92.

It may be noticed here that it has been held by a Division Bench of the Calcutta High Court, that the extension of time given under Section 11 of this Act to minors, will apply to and modify the provisions of Section 246 of Act VIII which require that a suit to set aside an order made under that Section should be brought within a year. *Anundnath Roy Choudhry v. Huro Soonduree Chowdhraïn*, 3 W. R. 8. It was held in this case that the plaintiff who was a minor at the date when the order was passed, might sue to set it aside at any time within a year from the date of his majority.

In default of an application made within one month under Section 230 of Act VIII of 1859, by a person dispossessed of immoveable property in execution of a decree, it has been held that a regular suit for recovery of possession would not be barred if brought within twelve years from the date of dispossession. *Kishen Soondur Talookdar v. Fakeerooddeen Mahomed*, W. R. 1864, p. 61.

A claim to immoveable property is not barred under this Clause, by reason that it has not been brought within one year from the date of a proclamation issued under Section 7 of Regulation V of 1799, since the provisions of that Section relate only to moveable property. *Shib Ram*

Lall v. Rajcoomar Mitter, 6 W. R. 48. Where a Judge's order relating to the landed property of a person dying intestate, is made without jurisdiction, it has no legal operation, and cannot be taken to be a summary order within the meaning of this Clause. *Augudh Nath v. Doorga Gir*, 1 Agra, 241.

A suit merely to set aside a summary decision under Act XIX of 1841 as to the right of possession, ought under this Clause to be brought within one year from the date of the decision which is sought to be set aside. *Greedharree Doss v. Nundo Kissore Dutt*, 2 Hay, 633. But a regular suit to establish a title to, and to be put in possession of ancestral property, in respect of which an application under Act XIX of 1841 has been disallowed, does not require, under this Clause, to be instituted within one year from the time when the application was rejected, but may be brought at any time within twelve years from the date when the cause of action arose, since a decision under Act XIX simply rules the right of possession, and is no bar to a regular suit, either by an unsuccessful applicant, or by a party evicted under it from possession. *Momeedoonnissa v. Mahomed Ali*, 1 W. R. 40; *Kanye Deyee v. Bipro Pershad Mytee*, 1 W. R. 341; *Loknarain Singh v. Ranee Myna Koer*, 7 W. R. 199. In the case of *Momeedoonnissa*, it was observed that where the Judge to whom an application under Act XIX of 1841 is made, refuses to entertain it, and refers the applicant to a regular suit, without even citing the defendant, his order is not such a decision or award as requires, within the meaning of this Clause, to be contested within one year. See also *Rudha Kissore Dossee v. Guthee Kissen Sirkar*, W. R. 1864, p. 272. An order passed under Act XX of 1841,* does not establish a will incontestibly as against the whole world, or prevent its being impeached in a regular suit. A daughter

* Repealed by Act XXVII. of 1860.

claiming as heiress at law may sue in the Civil Court at any time within twelve years from the date of her father's death to establish her title to the possession of his lands, and to set aside an adverse will in respect of which a certificate had been granted under Act XX of 1841. Clause 5, Section 1, Act XIV of 1859 is no bar to such a suit. *Sahoohra Beebee v. Azeemoollah Khan*, W. R. 1864, p. 227. Where a party who applies for a certificate under Act XXVII of 1860, fails to get it, and thereupon seeks to set aside the order rejecting his application, he must bring his suit within one year from the date of that order. But if he does not care to disturb the order, a suit brought by him to obtain possession of the property of the deceased upon proof of his title, is not barred by reason that it is not brought within one year from the date of the order. *Koylash Monee Dabea v. Kalee Prossonno Mookerjee*, 8 W. R. 126.

Where a claim for arrears of rent has been dismissed under Section 77, Act X of 1859, upon the intervention of a third party, a regular suit for a declaration of the plaintiff's title to the lands in respect of which the rent had been claimed is not barred by the provisions of this Clause, by reason of its not having been instituted within one year from the date of the decision in the rent case. *Kundurp Narain Singh v. Bundoo Ram Sein*, 3 W. R. x. 6.

SECTION 1, CLAUSE 6.

To suits brought by any person to contest the justice of an award which shall have been made under Regulation VII. 1822, Regulation IX. 1825, and Regulation IX. 1833 of the Bengal Code, or to recover any property

Limitation of three years.
Suits to contest certain awards.

comprised in such award—the period of three years from the date of the final award or order in the case.

THE enactments referred to in the text, regulate and define the powers to be exercised by the Revenue Authorities in the settlement of lands &c., and vest them with judicial cognizance in certain suits and claims relating to lands &c.

The provisions of this Clause to the effect that possessory awards under the Regulations cited shall become final unless questioned within three years, cannot be construed as enabling persons to sue within three years from the date of such awards for the recovery of possession of lands in respect of which their claim is barred by other provisions of the Act. If, for example, when A has been out of possession of lands for more than twelve years, the Survey Authorities should come and demarcate these lands as the property of B, and A should thereupon prefer a civil suit for declaration of his right and for recovery of possession, it could not be held that such a suit was within time, simply by reason that it was brought within three years from the date of the demarcation. *Beer Chunder Joobraj v. Ramguttty Dutt*, 8 W. R. 209. A bought certain lands in the year 1843, and held possession till 1866, when he was dispossessed under a settlement made by the Revenue Authorities in favour of B. A suing B for possession, it was contended for the latter that as the lands had been wrongfully sold by his guardian, during his minority and without his consent, the sale was invalid; that he had therefore been rightfully restored to possession by the settlement, and that the plaintiff was not entitled to re-enter. But it was held by the High Court that as the defendant had stood by for twenty-three years, during which he had made no objec-

tion to the sale, or to the plaintiff's holding under it, he could derive no benefit from the settlement proceedings. If he had a good title to the lands, he was bound to appear and press it within the period prescribed by law, and the settlement could not restore a right which he had lost by limitation. *Koshoram Pandey v. Moula Buksh Khan*, 10 W. R. 249.

A suit to recover any property comprised in an award made under the Regulations mentioned in this Clause, must be brought within three years from the date of the award. But a suit by a person who remains in possession after the award has been pronounced, to have his title confirmed, is not 'a suit to recover property,' and is not barred by the provisions of this Clause. *Mohima Chunder Chuckerbutty v. Rajkoomar Chuckerbutty*, 10 W. R. 22. In this case PEACOCK, C. J. said :—" We think that a person who remains in possession for three years and upwards after the making of a revenue award, is not barred by Clause 6 from maintaining a suit to confirm his title. Such an award could not, by virtue of Section 22 of the Limitation Act, be executed by turning him out of possession."

A plaintiff sued for the reversal of a survey award and for recovery of possession of certain lands, alleging dispossession at a date subsequent to the date of the award. It was held by a Division Bench, LOCH and GLOVER, JJ., that his suit, in so far as he sought recovery of possession was not barred by reason of its not being brought within three years from the date of the award. In giving judgment, the Court said :—" If the plaintiff had come into Court merely to ask for the cancellation of the survey award, he would have been obliged to bring his suit within three years of that award; but his claim to be restored to possession of land, from which he had been subsequently dispossessed, would be an entirely different cause of action, and one that would be governed

not by Clause 6, Section 1 of Act XIV of 1859, but by Clause 12, Section 1 of that Act. He would have, that is to say, twelve years to bring his suit." *Mozaffur Ally v. Girish Chandra Das*, 1 Ben. A. C. 25. The circumstances of this case are not fully stated in the report. If, however, the plaintiff was a party to the survey award, and was subsequently dispossessed under that award, it would rather seem that the view expressed by the Court is at variance with the provisions of Clause 6.

Where a plaintiff sues to reverse an award of a Survey Officer, and the defendant pleads that the suit is barred as not brought within three years from the date of the award, it is for the plaintiff to show cause why the provisions of this Clause should not be applied. *Azmeer Ali v. Komola Dossee*, 7 W. R. 13.

As this Clause re-enacts and supersedes Section 3 of Act XIII of 1848, many of the decisions on questions arising under that Section and Act, may be usefully consulted with reference its construction. It is, however, to be noted that while in computing the period of limitation prescribed under this Clause, deduction may be made on the ground of minority or other legal disability, no deduction could be allowed on such grounds from the term prescribed by Act XIII of 1848. *Modhoosoodhun Singh v. Peertee Bullub Paul*, W. R. 1864, p. 140; *Huro Chunder Chowdhry v. Kishen Koomar Chowdhry*, 5 W. R. 27. It may also perhaps be of importance to note that while by Section 3 of Act XIII, limitation is to be reckoned "from the date of the final award," by the terms of the Clause under notice, the computation is to be made "from the date of the final award or order in the case."

It has been held that before applying the limitation provided by Act XIII of 1848, it must first be seen that there has been an adjudication after a contention between the parties. *Andrews v. Hurry Mohun Thakoor*, W. R. 1864, p. 30; *Nobokishen Roy v.*

Gobind Chunder Sein, 6 W. R. 317; *Radha Pershad Singh v. Ram Jeewun Singh*, 11 W. R. 389. It would perhaps be more correct to say, that it is essential to the validity of the award, that the parties have had notice of the proceedings, and have had an opportunity given them to be present and take part in them. In a suit brought by a plaintiff as co-sharer in a joint undivided estate, for possession of certain lands, it was pleaded that he was barred by limitation, inasmuch as the lands had been for more than three years in the possession of the defendant under a compromise resulting from a survey award of which notice had been served upon the joint proprietors of the estate. The plaintiff contended that as no notice had been given to him individually, and as he was not present, and so was no party to the award and compromise, he could not be bound thereby, and consequently that the rule of limitation would not apply; and on this view, he obtained a decree in the lower appellate Court. But on special appeal, it was held by the High Court that the notice of the survey proceedings to the joint proprietors, of whom the plaintiff was one, was sufficient to make him a party to these proceedings, as it gave him an opportunity to attend and act; and that he was therefore bound by any award or compromise made in these proceedings or as the result of them, in exactly the same way as he would have been bound by a joint *ex-parte* decree after notice, and that his claim was consequently barred. *Sooruj Narain Roy v. Hur Lal Roy*, 3 W. R. 7.

But where neither of the parties are present at, or take part in the survey proceedings, there can be no adjudication. A petition for the amendment of a survey map was referred by the Deputy Collector to an Ameen for the purpose of making a local investigation. The Ameen returned, that as neither of the parties appeared before him he was unable to make the investigation, and the Deputy Collector thereupon struck the case out. It was

held, that the order of the Deputy Collector striking the case out, was not an award within the meaning of Section 3 of Act XIII of 1848, and that a suit for the amendment of the map was not barred under that Section by reason that it was not brought within three years from the date of the Deputy Collector's order. *Gholam Koodsee Chowdhry v. Rashee Chunder Ghose*, Marsh. 323.

Act XIII of 1848 applies only to suits for contesting the justice of an award as between the contending parties, and is no bar to a suit by one who was not such a party. A decision by a Collector, in a claim brought by B, that certain lands belong to A and Z, and not to the estate of B, is no bar to a regular suit for the possession of the same lands brought by C against A. The limitation provided under the Act referred to, is not applicable to such a case. *Komul Kishen Surkhul v. Bissonath Chuckerbutty*, W. R. sr. 128; *Ramaisher Singh v. Saira Zalim Singh*, 2 Agra, 8. On this point reference may also be made to the case of *Shib Ramchunder Mundul v. Pureag Singh*, 3 W. R. 165, in which the plaintiff having sued for the reversal of an award passed by the Survey Authorities, the defendant pleaded limitation on the ground that the suit had not been brought within three years from the date of the award. It was, however, held that the plaintiff as an auction purchaser at a sale for arrears of Government Revenue subsequent to the award was no party to the award, and consequently that his suit was not barred.

The proceedings of a Survey Officer in carrying out the *batwarah* and fixing the boundaries of B's estate, are in no sense an award or order binding upon A, who has been no party to these proceedings. Consequently, where A claims to recover lands which have been included by the Survey Officer in a map which he has made of B's estate, his suit is not governed by the special law of limitation provided by the Clause under notice. *Hurree Pershad v. Rughoobur Singh*, 6 W. R. 75. The decision of a Collector

under the *batwarah* law, dividing a zemindary, and determining that rent is payable by an occupier of part of the land after a particular rate, is not an award binding upon such occupier, if he be no party to the proceedings. *Greedharee Singh v. Pultoo Roy*, Marsh. 37. It was observed by the Court in this case, that the decision of the Collector was not an award within the meaning of Section 3, Act XIII of 1848, since that Act applies only to awards made by the Revenue Authorities under Regulations VII of 1822, IX of 1825, and IX of 1833. Compare *Ram Chund v. Zahoor Ali Khan*, 1 Agra, 134.

A suit substantially to vary the boundaries laid down in a survey award, when brought by one who had been a party to the award, must be instituted within three years from the date of the award. *Jankee Ram Mohunt v. Harradhone Bannerjee*, W. R. 1864, p. 38. It would seem that even where a plaintiff is not legally bound by a survey award made under Regulations VII of 1822, and IX of 1825, he having been no party to the proceedings, he cannot after three years from the date of the award have passed, maintain a suit to rectify it or set it aside. If the award is a nullity, the plaintiff cannot ask the court to rectify what he says is a nullity. *Mohima Chunder Chuckerbutty v. Rajkoomar Chuckerbutty*, 10 W. R. 22. It has been held that as a decision in a boundary suit decides only the question of the right to possession irrespective of the right to assess, Act XIII of 1848 cannot be applied to bar a suit for the assessment of lands as rent paying. *Mahomed Ali Khan Chowdhry v. Jadub Chunder Chuckerbutty*, W. R. 1864, p. 60.

Where, owing to the refusal of A, the original possessor of a resumed *muaafi* plot of land, to fulfil the revenue engagements, a temporary settlement was made with B, and on the expiry of the temporary settlement, A sued to establish his right in the land, it was held by the Agra High Court that as no question of right had been deter-

mined by the order of the settlement officer, the limitation provided by the Clause under notice could not be applied. *Mahomed Mohiboollah v. Mahomed Ataoollah*, 1 Agra, 231; compare *Bheema v. Pahlad*, 2 Agra, 38; *Brojo Soonduree Dabea v. Watson*, 10 W. R. 395. At the time of the settlement of an estate, A preferred a claim before the settlement officer to be registered as proprietor. On the objection of B, the settlement officer rejected the claim, and ordered that A should be registered merely as hereditary cultivator, referring him to the Civil Court to establish his claim as proprietor. It was held by the Agra High Court, that a suit by A in the Civil Court to establish his proprietary right, not having been brought within three years from the date of the order of the settlement officer, was barred. *Surdar Khan v. Chundoo*, 1 Agra, 228. On a Collector proceeding under Regulation VII of 1822, to settle an estate which had been mortgaged, both the mortgagor and the mortgagee appeared before him and contended for the right of settlement. The award of the Collector was in favour of the mortgagee who was in possession, on the ground that the period for redemption had expired, and the estate was accordingly settled with him. The mortgagor subsequently suing for recovery of the property, his suit was dismissed under the provisions of this Clause, as not brought within three years from the date of the Collector's order. *Mullick Choolhun v. Sreechund Baboo*, 9 W. R. 564.

The order of a settlement officer under Regulation VII of 1822, declaring certain lands to be *Paykan Jagheer* lands is an award within the meaning of Act XIII of 1848, and must be sought to be set aside within three years. *Modhoosoodhun Singh v. Peertee Bullub Paul*. W. R. 1864, p. 140. An award of a Survey Officer under Regulation VII of 1822, founded upon and adopting a possessory order passed by a Magistrate under Act IV of

1840, has been held to be a legal award within the meaning of Act XIII of 1848, which cannot be set aside after the limitation prescribed by Section 3 of that Act has run. *Boroda Churn Bose v. Ramguttty Nag Chowdhry*, 1 W. R. 120. A plaintiff alleging that while he was in possession of certain lands, the defendant had obtained a survey award demarcating the lands as belonging to him and in his possession, sued to set aside the award, and for a declaration as against the defendant, of his right to possession. It was held by the lower Courts that although the plaintiff's suit was brought within three years from the date of the survey award, yet inasmuch as that award was in strict conformity with a previous possessory order, made by a Magistrate under Regulation XV of 1824, limitation must be reckoned from the date of such previous order, and that reckoning from that date, the suit was barred. On appeal, however, it was held by the High Court, that if the plaintiff's allegation of possession at the time of the survey award was true, his cause of action must be taken to have arisen from the date of the award, and not from the date of the previous possessory order. *Rajkisto Roy v. Beer Chunder Joobraj*, 4 W. R. 100.

In the case of *Anund Chunder Roy v. Huro Nath Roy*, 1 W. R. 329, the plaintiff had sued in the Civil Court to establish his title to certain lands, and had obtained a decree. Subsequently, a Survey Officer, on the ground that the plaintiff's possession was only nominal, and that the defendants were really in possession of the lands, demarcated them to the defendants. The plaintiff suing for the reversal of this award more than three years after it had been passed, the defendants pleaded limitation; but it was held that as the plaintiff's title had been tried and established in a competent Civil Court, the proceedings of the Survey Authorities setting aside that decision were of no force, and that the only law of limitation which could be applied to the case was the general one of twelve years.

The order of a Collector rejecting a claim to alluvial lands on the ground that a settlement of them has already been made, has been held not to be an award within the meaning of Act XIII of 1848. *Shurut Soonduree Dabea v. The Government*, 7 W. R. 42. At the time of a boundary demarcation, A and B each laid separate claim to a *bheel* as belonging to them. Demarcation was made in favour of B. Subsequently a claim to the same *bheel* was put forward by C, but the Survey Officer refused to hear him, or to entertain his petition, on the ground that he had not come in before. A civil suit for possession of the *bheel* having been brought by C against B, limitation was pleaded under Act XIII of 1848. But it was held that as C's claim had not been heard and adjudicated upon by the Survey Officer, the order rejecting his petition, was not an award within the meaning of the Act cited. *Shama Soonduree Dabea v. Prossonno Coomar Tagore*, 1 W. R. 114.

Where a person appealed from an award of a Collector, and his appeal was struck off by the Commissioner for default of prosecution, and he subsequently sued to set aside the award, it was held that limitation, under Act XIII of 1848, began to run against him from the date of the Collector's award, and not from the date of the order of the Commissioner in the appeal proceedings. *Gholam Durbesh Chowdhry v. Sham Kishore Roy*, W. R. 1864, p. 378. The Court observed in this case that "proceedings ineffectually taken and prosecuted without due diligence, and ending in an order by which the appeal was struck off the file, are not in the same position as an appeal duly prosecuted to a hearing and ending in a judgment. The effect of such proceedings is nothing. The final award must be taken to be that of the Collector, and the three years must be counted from that date."

An appeal was presented against the award of a Deputy Collector. The Superintendent of Survey struck the appeal off his file, assigning as his reasons for doing so, that

the appellant had not filed a copy of the decision of the Deputy Collector, and had delayed in filing his grounds of appeal. The appellant more than three years from the date of the Deputy Collector's award, but within three years from the date of the order of the Superintendent of Survey, sued to set the award aside. It was held by the High Court that the order of the Superintendent of Survey was not an award within the meaning of Act XIII of 1848, and that limitation must be reckoned from the date of the Deputy Collector's decision. *Sham Kant Bannerjee v. Gopaul Lal Tagore*, 1 W. R. 328.

An award made by a Superintendent of Survey was appealed successively to the Commissioner and to the Board of Revenue. The Commissioner and the Board both declined to go into the merits of the case and summarily threw out the appeal. A civil suit was then brought to establish the title of the plaintiff by setting aside the award. It was held by the lower appellate Court on the authority of the case last cited, that as the Commissioner and the Board of Revenue had summarily rejected the appeal without enquiry into the merits, the only real award was that made by the Superintendent of Survey, and that the plaintiff's suit not having been brought within three years from the date of that award, was out of time. But it was held by the High Court on special appeal that the final order from which limitation was to be reckoned was that of the Board of Revenue. The Court observed:—"The law admits an appeal from the award of a Survey Officer to his immediate superiors, and to the Commissioner and the Board of Revenue, and the fact that the Board summarily dismissed the appeal without entering into the merits of the case, does not make it the less a final order. In our opinion, this suit being brought within three years from the date of that order was within time." *Krishna Chandra Das v. Mohamed Afzal*, 1 Ben. A. c. 10.

A Survey Officer demarcated as belonging to C, certain lands contained in one plot, to which A and B had separately put forward claims. A appealed against the award, but his appeal was dismissed. More than three years from the date of the award, B brought a suit to set it aside. It was contended for B that his suit was in time as brought within three years from the order on A's appeal. But it was held that he could have no benefit from that appeal, as his rights were distinct and separate from those of A. *Tulsiram Das v. Mohamed Afzal*, 1 Ben. A. c. 12.

In a suit by A to reverse an award of the Revenue Authorities, B, the defendant, pleaded limitation under the provisions of Act XIII of 1848, but as it appeared that, during the period subsequent to the award, A had been engaged in defending a suit in which B was plaintiff, in which the title to the property in dispute was involved, and which terminated in A's favour, it was held that A was not barred by the provisions of the Act cited. *Maharajah Hetnarain Singh v. Fyaz Ally*, 2 Hay, 50. This case was decided while the old law of limitation was still in force. Under Section 14, Act XIV of 1859, the time during which the other suit was pending, could not have been deducted in computing the time within which the suit for the reversal of the award should have been brought.

In computing the period of limitation provided by this Clause, the day on which the award was passed should be excluded. *Rumonee Soonduree Dossee v. Panchanun Bose*, 4 W. R. 105.

SECTION 1, CLAUSE 7.

To suits by any party bound by any order re-

Limitation of three years.

Suits to recover property comprised in an order made under Clause 2 Section 1 Act XVI of 1838, or Act IV of 1840.

specting the possession of property made under Clause 2, Section 1, Act XVI of 1838, or Act IV of 1840, or

any person claiming under such party, for the recovery of the property comprised in such order—the period of three years from the date of the final order in the case.

CLAUSE 2, Section 1, Act XVI of 1838, empowers the Revenue Courts of the Bombay Presidency to give immediate possession of lands, &c., to any person unlawfully dispossessed thereof, provided he apply within six months from the date of dispossession. Act IV of 1840,—for preventing affrays concerning the possession of land, and for providing relief in cases of forcible dispossession, in Bengal,—was repealed by Act XVII of 1862. Its provisions are, with certain modifications, embodied and re-enacted in Chapter 22, Act XXV of 1861, but as no special period of limitation is provided by this last Act, within which suits for the recovery of property comprised in an order made under the Act shall be instituted, it has been held that a suit to set aside such an order is in time if brought within twelve years from the date when the plaintiff's cause of action arose, and that the limitation prescribed by the Clause under notice, is not applicable to such a suit. *Ashruf Ali Meah v. Gobind Chunder Shaha*, 8 W. R. 490; *Undhoob Narain v. Chuttur Dharee Singh*, 9 W. R. 480.

Where a plaintiff sued for possession of lands which had for some time been under attachment in accordance with the provisions of Act IV of 1840, but which had eventually been released in favour of the defendant, and it was proved that up to the time of the attachment the plaintiff was not actually deprived of possession, it was held that limitation did not begin to run against him from the date of the attachment, but from the time when possession was finally given to the defendant by the order of the Magistrate. *Greesh Chunder Chowdhry v. Bhaguruthee Dabea*, 2 Hay, 541. A and B disputed for possession of cer-

tain lands. The Magistrate, under Act IV of 1848, passed an order declaring A to be in possession, and entitled to retain possession until ousted by due course of law. B appealed to the Sessions Judge who reversed the order of the Magistrate and declared that B was in possession at the time when the Act IV proceedings commenced. A then instituted a regular suit for recovery of the lands. The lower appellate Court holding the order of the Sessions Judge to establish that A had been out of possession from the time the proceedings commenced, considered the claim to be barred. But it was held by the High Court on appeal, that as it appeared that during the pendency of the proceedings, both parties had been in possession or struggling for possession, limitation could only be held to run against A from the time when he was finally ejected under the order of the Sessions Judge. *Lyons v. Rajchunder Shikereessur Roy*, 2 W. R. 162.

In a suit for possession of certain lands, the plaintiff claimed that his right of action should be held to have accrued from the date of a decision of a Magistrate under Act IV of 1840, by which he was declared not to be in possession of the lands in dispute. This contention would seem to have been sanctioned by the lower Courts. But on appeal, it was held by the High Court that inasmuch as the Magistrate's decision went to show that the plaintiff was not in possession either at the time when that decision was passed, or when the dispute originated, it was incumbent on the lower Courts to have looked to the state of facts which existed before the Magistrate's order was passed, and to have decided whether the plaintiff had been able to prove dispossession within twelve years. *Tiluckdharee Singh v. Somoodha Singh*, 6 W. R. 9. The effect of this decision seems to be, that where a suit for possession is barred by the general rule of twelve years' limitation, the special rule provided by the Clause under notice cannot be applied. Compare the cases of *Bishonath Dutt v. Brojo*

Rajkishoree, W. R. 1864, p. 305, and *Hurriah Chunder Choudhry v. Hurro Soonduree Dabea*, 2 W. R. 300, in the latter of which it was held that a party seeking to disturb an award passed by a Magistrate under Act IV of 1840, must date his cause of action not from the Magistrate's decision declaring that he was not in possession, but from the actual date of dispossession.

Where a plaintiff has been dispossessed from certain lands by an award of a Magistrate under Act IV of 1840, he cannot, ignoring that award, and after the lapse of more than three years from its date, sue to establish his right to such lands, since had he sued to establish his right by the reversal of the award, the suit must have been brought within three years. *Ameeroonnissa v. Shaikh Jainooddeen Ahmed*, 2 W. R. 182.

A verbal order alleged to have been passed by a Magistrate under Act IV of 1840, cannot be regarded as an order or award within the meaning of this Clause. *Makomed Kootub Alum v. Gunga Pershad*, 2 Agra, 26.

A plaintiff sued to recover certain lands from which he alleged that he had been dispossessed by the defendant. The defendant pleaded limitation under this Clause. But it was held by the High Court on appeal, that inasmuch as there had been no final decision in the case instituted under Act IV of 1840, which had been struck off the file, the plaintiff's suit, which was brought within twelve years from the date of ouster, was in time. *Dyram Sahoo v. Beebee Sograh*, 3 W. R. 174.

A complained to a Magistrate under Act IV of 1840, of having been dispossessed from certain lands. The Magistrate, finding that the complainant had not been dispossessed, refused to act on the complaint and dismissed it, without passing any order as to possession. A suing to recover possession, it was held by a Division Bench that the Magistrate's dismissal of the claim without passing any order as to possession, was not such an order as required

the complainant to sue to set it aside within the time prescribed by this Clause. *Hurronath Chowdhry v. Hurree Lal Shaha*, 11 W. R. 477.

Before Act XIV of 1859 came into operation, a suit to recover certain lands comprised in an order passed under Act IV of 1840, was on an apparently fraudulent under-valuation, brought in a Court without jurisdiction to try the case. The under-valuation having been brought to notice, the plaint was returned to the plaintiff who filed it in the proper Court, after Act XIV had come into operation. It was held by the High Court on appeal that the case was governed by the provisions of the Clause under notice, and that as more than three years had elapsed between the date of the final order in the proceedings under Act IV and the second filing of the plaint, the claim was barred. It was observed that as the institution of the suit in a Court without jurisdiction, upon an under-valuation of the claim, could not be considered a *bonâ fide* proceeding, no deduction of the time the suit was pending in that Court could be allowed. *Indhoo Bhoosun Deb Roy v. Hurronath Roy*, W. R. 1864, p. 280.

In the case of *Meernomoyee Dossce v. Ram Kanye Gosamee*, 2 W. R. 49, the plaintiff sued to set aside an order passed under Act IV of 1840, filing her suit on the very last day on which it was not barred by limitation under this Clause. In her plaint, she described herself as the widow of A, deceased, and she shewed no title to the property in dispute, save as being the heiress and representative of A, according to Hindoo Law. The defendant pleaded that the plaintiff had no right to sue, inasmuch as she was not the representative of her deceased husband, he having left sons who were alive, and who were his heirs. Upon this, the sons, more than six months after the institution of the suit, filed a petition, in which they declared that the plaintiff was in possession of all their father's property, and had therefore full right to sue, and on this

view, the plaintiff obtained a decree in the lower appellate Court. But on special appeal, it was held by the High Court, that as the plaintiff had no title to the lands in dispute at the time she filed her plaint, and as the petition, subsequently filed by her sons, did not remove that defect in her case, the suit was barred.

It has been held that possession under an erroneous order passed by a Magistrate under Act IV of 1840, which order has been subsequently set aside by the order of a superior Court, does not constitute such *bonâ fide* possession as will prevent limitation from running against the person so holding. *Ranee Luckhee v. Mooktokashee Dabea*, 1 Hay, 306; and compare *Sham Manjee v. Firinghee Sahoo*, 8 W. R. 373. It would, perhaps, be more correct to say, that dispossession by the order of a superior Court, after possession held under an erroneous order of a Magistrate, affords no new cause of action to the person so dispossessed, who in a suit for recovery of possession must show that his original cause of action has accrued within the twelve years fixed by the general rule of limitation. In connection with this question, reference may be made to the cases of *Annundonath Roy v. Digumburee Dossee*, W. R. 1864, p. 43; *Motee Singh v. Rajah Leelanund Singh* 11 W. R. 49; *Golam Nubbee v. Bissonath Kur*, 12 W. R. 9.

SECTION 1, CLAUSE 8.

To suits to recover the hire of animals, vehicles, boats, or household furniture; or the amount of bills for any articles sold by retail; and to all suits for the rents of any buildings or lands (other than summary suits before the Revenue Author-

Limitation of three years.

Suits for goods sold by retail, suits for rent of buildings or lands, &c.

ities under Regulation V. 1822 of the Madras Code)—the period of three years from the time the cause of action arose.

THE operation of this Clause was suspended by Act XXXII of 1861, and subsequently by Act XIV of 1862, by which latter Act it is provided that "all suits that may now be pending, or that shall be instituted before the 1st of January, 1865, to recover the amount of bills for any articles sold by retail, shall, in all cases in which the cause of action arose before the passing of Act XIV of 1859, be tried and determined as if that Act had not been passed."

An action was brought before the 1st January, 1865, by a jeweller to recover the price of pearls sold by him to the defendant. On it appearing that the pearls had been bought by the defendant to be worked up as ornaments for his family, and not for resale or to be dealt with as merchandize, it was held that the sale was by retail within the meaning of this Clause, and although more than three years had elapsed from the date of the transaction, that under the provisions of Act XIV of 1862, the suit was within time. *Buldeo Doss Johurry v. Sreenath Sein*, 1 Ind. Jur. 114.

Suits for the price of articles supplied to the defendant from time to time for household purposes, *e. g.*, for the value of cloth, glassware and the like, where the plaintiff has acted as an ordinary trader, and delivered the articles as they were required, are governed by the limitation provided under this Clause, and not by that prescribed by Clause 16, Section 1 of the Act. *Shamachurn Loll v. The Collector of Tirhoot*, 1 W. R. 308; *Bucha Gopee v. The Collector of Tirhoot*, 7 W. R. 101. These decisions had reference to the opinion which at one time

prevailed that as the Act expressly provides a period of three years as the time within which suits arising out of retail sales are to be brought, it must have been intended that suits on sales by wholesale should have a longer term, and, as no specific term had been fixed, that they should be governed by the general provisions of Clause 16. It was consequently of importance to distinguish between cases of retail and wholesale, in order to determine whether the three or six years rule of limitation should be applied. *Chunder Churn Paul v. Ramnarain Sein*, Coryton, 8; *Mothoora Lall Paul v. Chrinebash Dutt*, Mof. S. C. Ct. Ref. p. 170; *Sonatun Goocho v. Parbutty Churn Roy*, 'Indian Daily News,' August 25th, 1865; *Gopal Chunder Shaha v. Sinaes*, 8 W. R. 4. But the ruling of the Full Bench of the Calcutta High Court in the case of *Lall Mohun Holdar v. Mohadeb Kattee*, 9 W. R. 193, establishes that suits for the price of goods sold wholesale, where there is no written contract, are governed by the three years' rule of limitation prescribed by Clause 9. In this case it was also said that suits for the price of articles sold by retail, whether the contract be in writing or not, and whether registered or not, fall within the provisions of Clause 8, and must be brought within three years. It may be doubted, however, whether, if a contract for the sale of goods by retail were registered under Section 18, Act XX of 1866, the time for suing would not under Section 51 of that Act, be six years.

Where a tradesman supplies goods from time to time on credit to a customer who makes payments from time to time on account, no fixed period of credit being agreed upon, the cause of action in a suit for the price must be taken to have arisen on the date when each article, the price of which is sought to be recovered, was delivered. But where the parties intend that all goods delivered are to be paid for after the expiry of a fixed period of credit, limitation runs, not from the time of sale or delivery, but

from the expiry of the term of credit. *Satkouree Singh v. Kristo Bangal*, 11 W. R. 529.

The provision in this Clause relative to 'suits for the rent of any buildings or lands,' and its construction with reference to the provisions of Sections 23 and 32 of Act X of 1859, were discussed in the case of *Modhoosoodhun Paul Chowdhry v. Poulson*, 2 W. R. x. 21, in which it was held unanimously by a Full Bench that suits for arrears of rent brought under Act X of 1859, are altogether unaffected by the provisions of the Limitation Act. It was observed in this case by NORMAN, J., that the word 'lands' as used in this Clause might have a sufficient meaning given to it, by treating it as a term subordinate to buildings,' i. e., as applying to buildings and lands appurtenant thereto.

It has been held by the Bombay High Court that where the existence of a tenancy is proved, the fact of the tenant not having paid rent to his landlord for twelve years prior to the institution by the latter of a suit for rent, is no bar to the landlord's right to recover rent falling due within the period of limitation provided by this Clause. *Hari Vasudev v. Mahadaji Apaji*, 5 Bom. A. c. 85.

SECTION 1, CLAUSE 9.

To suits brought to recover money lent, or interest, or for the breach of any contract—the period of three years from the time when the debt became due, or when the breach of contract in respect of which the suit is brought first took place, unless there is a written engagement to pay the money

Limitation of three years.

Suits for money lent, or interest, or for breach of contract where no written contract exists.

lent, or interest, or a contract in writing signed by the party to be bound thereby or by his duly authorized agent.

THE provisions of this Clause are applicable to suits to recover remuneration under a contract for work and labour where there is no written engagement, and where the parties do not stand to one another in the relation of master and servant. *Carruthers v. Menzies*. Coryton, 40.

In the case of *Potitpabun Sein v. Chunder Kanth Mookerjee*, 1 Ind. Jur. N. S. 329, in which the plaintiff sued to recover payment for work done in screwing jute for the defendant, under a verbal agreement, and on the understanding that payment should be made as the jute was screwed into bales, it was argued that as no special period of limitation was provided for a claim of the kind, it was governed by the general provisions of Clause 16. But it was held that the case fell within the provisions of Clause 9. PHEAR, J., said :—"I cannot look upon a debt of this kind as anything else than a simple contract debt. It is curious that the terms of the Act should split up cases of simple contract into several groups, and that besides these, the general word contract should be employed as if distinctive of another group, and possibly the naming so many cases of simple contract separately, may make a little difficulty in the way of holding that the others are intended to be included in the generic term. But I cannot say that this weighs with me much. The money became due on an express contract; the non-payment is clearly a breach for which the plaintiff might have sued the moment it was committed, that is, more than three years before the filing of the plaint." Compare *Dhurumnarain v. Brijodoss*, reported in the 'Englishman,' September 12th, 1866.

Where the contract between a vakeel and his client is merely a verbal one, a suit by the vakeel for his fees

must be brought within three years from the time when his cause of action accrues; and if there has been no express stipulation as to the time when his fees are to be paid, his cause of action must be taken to accrue from the date when decision was given in the suit which he was engaged to conduct or defend; the implied agreement in such cases being to pay one fee, and to pay it when the suit is decided. *Dwarkanath Moitro v. Kenny*, 5 W. R. s. c. 1; *Runjeet Roy v. Perladh Sein*, W. R. 1864, p. 68; *Ishur Chunder Mookerjee v. Kashinath Roy Chowdhry*, 5 W. R. 297. In a vakalutnamah executed at Dacca in the year 1863, the party granting it agreed to pay the vakeel his fees 'according to law.' In a suit by the vakeel for his fees, it was held by the High Court that the vakalutnamah was an obligation for the payment of money, and might as such have been registered under Section 5, Regulation XX of 1812, and that as it had not been so registered, the plaintiff was bound to bring his suit within three years from the date when his cause of action arose, *i. e.*, from the decision of the suit to which the vakalutnamah referred. *Ishur Chunder Mookerjee v. Rashmohun Goswamy*. 9 W. R. 113. In this case it was also decided that where there is nothing said in a vakalutnamah as to the payment of fees, a suit for the amount of fees due for business done under the vakalutnamah, is governed by the rule of limitation laid down in this Clause.

In the case of *Jumna Pershad v. Bheem Sein*, 1 Agra, MIS. 8, it appeared that the defendant had appointed the plaintiff to act for him as his general attorney under a mookhtearnamah dated the 30th March 1855, on wages of Rs. 48 by the year. The plaintiff sued on this contract for wages due to him from May 1861, to March 1862, filing his plaint on the 21st September 1864. It was contended for the defendant that as the claim was one for wages, it was barred by the one year rule of lim-

itation provided by Clause 2, Section 1 of the Act, but it was held by the Agra High Court that the provisions of that Clause were wholly inapplicable to the case, which, as a suit for breach of a written contract, was governed by the limitation prescribed in Clauses 9 and 10 of Section 1 of the Limitation Act. Compare *Nitto Gopal Ghose v. Mackintosh*, 6 W. R. c. r. 11, and the other similar cases cited *supra* in the remarks on Clause 2.

Where the plaintiff, a native artist, agreed to supply, and the defendant agreed to purchase pictures as ordered from time to time, subject to the approval of each picture by the defendant, and it was verbally agreed that the prices should be fixed upon delivery and acceptance; it was held by the Madras High Court that a distinct contract became complete in respect of the pictures as they were from time to time delivered and approved of, at the price then fixed; and that the plaintiff's suit for the price of the pictures supplied by him, was governed by the rule of limitation prescribed by this Clause, since the pictures were neither articles sold by retail within the meaning of Clause 8, nor could their price be considered to be the wages of an artizan within the meaning of Clause 2 of this Section. *Virasvami Nayak v. Sayambabay Sahiba*, 2 Mad. 6.

As has already been noticed, doubt was at one time entertained as to whether the limitation applicable to suits arising out of wholesale transactions, was that of three years under Clause 9, or of six years under Clause 16 of this Section. But the question has been set at rest by the ruling of the Full Bench in the case of *Lall Mohun Holdar v. Mahadeb Kattee*, 9 W. R. 193. In this case it was said by PEACOCK, C. J.;—"It is clear that a suit brought for the non-payment of the price of goods sold by wholesale, is a suit for breach of contract. A suit for the non-delivery of the same goods under the same contract, would be a suit for the breach of contract. A suit

for the non-acceptance of the same goods under the same contract, would be a suit for the breach of contract. Therefore it appears to me that whether the suit is for the price of the goods, or for the non-acceptance of the goods, or for their non-delivery, it is a suit for the breach of a contract, and falls within Clause 9, or 10, and not within Clause 16. An action for the non-payment of the price of goods sold wholesale is within Clause 9, unless the contract is in writing. If the contract is in writing, then we must go to Clause 10, to see what is the period of limitation."

In a suit to recover a balance of money advanced in payment of goods to be subsequently supplied, the limitation applicable is that prescribed by this Clause, and not that provided by Clause 16. Dealings of the nature indicated do not bring the case within the provisions of Section 8 of the Act. *Boiddonath Shaha v. Lalunnissa Beebee*, 7 W. R. 164. Where A had been in the habit of sending goods to be sold by B as his commission agent, under an arrangement that if the purchaser of the goods should fail to pay for them within a specified time, B should make good the price, and, after a long course of dealing, A sued B for the price of goods which the purchasers had failed to pay for, it was held that the case was governed by the limitation provided by the Clause under notice, as a suit for a breach of contract not in writing. *Woonkur Pershad Rustobee v. Phool Koomaree Beebee*, 7 W. R. 67.

Certain indigo factories and lands sown with indigo were given by A in lease to B, who agreed to take over all contracts and to pay all expenses which had been incurred for the season's sowing, depositing a certain sum as the amount of outlay incurred. The lease having been set aside by C, B agreed to give up the factories and all the indigo manufactured by him while in possession, on condition of being repaid by C the amount he had deposited, which repayment was accordingly made. In a

suit brought by C against B, on the allegation that the latter had failed to deliver up all the manufactured indigo, it was held that the claim was a simple suit for breach of contract within the meaning of this Clause, and was barred as not brought within three years from the time when B failed to deliver all the manufactured indigo in accordance with his agreement. *Shama Soonduree Dabea v. Jardine, Skinner & Co.*, 9 W. R. 367.

In September 1863, A agreed to purchase certain lands from B, and deposited with him a part of the purchase money, agreeing to pay the balance within seven days, when the purchase was to be concluded. A failing to pay the balance within the time fixed, B, in June 1864, sold the lands to C. A thereupon sued B and C for specific performance of the contract, and obtained a decree in the Court of first instance. B did not appeal from this decision, but it was reversed, on appeal by C, on the 29th August 1865. On the 29th July 1867, A sued B for recovery of the purchase money which he had deposited in September 1863. It was pleaded that under this Clause the suit was out of time. But it was held by a Division Court that A's cause of action only accrued from the date of the decision on C's appeal. *Srinath Singh v. Ramjay Dey*, 2 Ben. A. c. 170.

It has been held by the Agra High Court that a letter directing an advance of money to be made to a third party, and containing a promise on the part of the writer to repay the advance with interest, is a written engagement within the meaning of the latter portion of the Clause under notice, and that the period applicable to a suit brought for the breach of such an engagement is that of six years provided by Clause 16, Section 1 of the Act. *Chotey Lall v. Mohun Lall*, 1 Agra, 52. This decision, however, proceeds upon the view that the writing in question could not at the time and place where it was executed, have been registered. Had it admitted of registration

and not been registered, three years would have been the period of limitation under this and the following Clause.

The case of *Shaikh Amjad Ali v. Syud Ali Buksh*, 2 W. R. 122,—in which it was held, that the limitation of six years, and not of one, or of three years, is applicable to an action for damages arising out of the tortious act of a servant in not paying over a sum of money which had been entrusted to him for a particular purpose,—has already been noticed in the remarks on Clause 2 of this Section. A similar question of limitation was again raised in the case of *Radhanath Dutt v. Gobind Chunder Chatterjee*, 4 W. R. s. c. 19, in which the plaintiff sued the defendant, who had formerly been in his employment as *gomastah*, for a certain sum of money received by him on the plaintiff's behalf, and for which he had not accounted. The lower Court distinguishing the case, as being brought upon an implied contract, from the case of *Amjad Ali*, in which the cause of action was held to have been founded on tort, was of opinion that the defendant's omission to pay over, or account for the money received by him for his employer, was a breach of contract within the meaning of the Clause under notice, and should be governed by the limitation therein provided. The case was, however, referred to the High Court for an opinion, as to what period of limitation is properly applicable in a suit by a principal against an agent for the recovery of money received by the latter during his agency, and not accounted for. On this reference, the following judgment was given by the High Court:—"Whether the servant or agent receives money from his employer with directions to apply it to a particular purpose, or receives money from a third person, being the proceeds of goods sold by the servant for his employer; the misappropriation of the money in both cases creates a right of suit of the same nature, and subject to the same limitation. The Judge of the lower Court conceives that the ground of action in the referred case is

founded on an implied contract by the *gomastah*, to pay over to the plaintiff the sum received from a third party, and that the case may, therefore, be distinguished from the decision of the High Court which is cited. The cause of action is, we think, essentially the same in both cases, whether it be described as a tort, or as arising on an implied contract. Clause 9, Section 1, Act XIV of 1859, which provides a limitation of three years for suits brought 'for the breach of any contract,' seems not to apply to the case of suits like the present, which may be considered to be founded, not so much on a contract in the sense in which that word is used in Clause 9, as on an obligation created by law, and resembling a contract in many of its consequences, which makes the defendant responsible for the money received by him from a third party and misappropriated. The suits for breach of contract which are contemplated by Clause 9, are suits of a different description from the present, as is, we think, fairly to be gathered from the whole language of that Clause. No other provision of the law being applicable to the case, we hold in conformity with the decision referred to, that the proper period of limitation is six years." As to the period of limitation in suits between principal and agent, see also *Syud Munsoor Ally Khan v. Prossonno Narain Deb*, Coryton, 25; *Penuballi Subharamareddi v. Bhimaraju Ramaya*, 2 Mad. 21.

A view similar to that taken by the Court in the case of *Radhanath Dutt*, has been followed in a variety of cases arising out of implied contracts. Thus it has been decided that in a suit for contribution, by a party who has paid the entire amount due under a joint decree payable by rateable shares, the limitation applicable is that of six years, under Clause 16, since the cause of action may be taken to arise upon the breach of an implied contract on the part of those for whose benefit the payment was made, to refund the money so expended to him who paid it.

Doorga Mohun Doss v. Doorga Monee Dossee, 2 W. R. 266; *Nobokisto Bhunj v. Rajbullubh Bhunj*, 3 W. R. 134; *Thakooree Singh v. Chohagur*, 1 Agra, 123. Similarly with regard to suits for mesne profits, in which also the cause of action arises on the breach of an implied contract, it has been held that the period of limitation is six and not three years. See *postea* the cases relating to mesne profits cited under Clause 16.

As to the rule of limitation to be applied to suits brought on 'an account stated' the decisions are somewhat conflicting. It has been held by the Bombay High Court, COUCH, C. J. and WESTROPP, J., reversing a decision of ARNOULD, J., that as the action upon an account stated is founded not upon an express contract, but upon a contract implied by the law that the party against whom the balance appears has engaged to pay it, in accordance with the "general implication and intendment of the Courts of judicature, that every man hath engaged to perform what his duty or justice requires," the limitation applicable to such a suit is that provided under the general terms of Clause 16, and not that of Clause 9, since the latter must be understood to relate only to suits for the breach of express contracts. *Umedchand Hukamchand v. Sha Bulakidas Lalchand*, 5 Bom. o. c. 16. In this case it was accordingly held that the plaintiff's suit, having been brought within six years from the date of an adjustment of accounts between the parties, was not barred. Compare *Doyle v. Edoo Gazeer*, 3 W. R. s. c. 13, in which, however, the judgment of the Court is not very distinct.

In the case of *Doyle v. Khooseal Khan*, 3 W. R. s. c. 1, the defendant had received from the plaintiff, advances for the cultivation of indigo. In the year 1859, his accounts were adjusted in his presence, and a balance struck, the correctness of which he verbally admitted. A fresh advance was then made to him for the cultivation of indigo in 1860. The defendant having ceased to cultivate in

1861, the plaintiff sued him in 1865, for the balance due on the advances made to him. It was held that immediately on the balance of accounts being struck in 1859, the amount then ascertained to be owing became a debt due from the defendant to the plaintiff on a simple contract to pay, for which the statement of account then come to was the consideration; that the subsequent giving of credit in respect of the ascertained balance, and the further advance was also a matter of simple contract between the parties; that on the defendant's failure to fulfil his side of the contract, the law implied upon his part a binding engagement to pay back the money which he had received from the plaintiff on the faith of his undertaking to cultivate; and that whether the plaintiff's right to sue was technically referable to the defendant's breach of the contract under which the money was advanced, or to a contract to refund subsequently implied, in either alternative, the suit came within Clause 9, and not, as a case not expressly provided for, within Clause 16 of this Section. The Court was further of opinion that there was no ground whatever for holding that the parties stood towards each other in the relation of merchants who have had mutual dealings within the meaning of Section 8 of the Act.

In the case of *Doyle v. Allum Biswas*, 4 W. R. s. c. 1, the plaintiff sued in May, 1865, to recover the balance alleged to be due by the defendant on an account stated in December, 1860. The defendant pleaded limitation. From the evidence, it appeared that in 1859 the defendant had received a fresh advance, and that in 1860 he delivered one bundle of indigo. At the close of the latter year, the adjustment of accounts which was made the cause of action, took place. The accounts were not signed by the defendant, but it was proved that the adjustment had been made in his presence, and that he had verbally admitted their correctness. The case was referred to the

High Court for an opinion on the following question.—
“Is the verbal admission by a ryot of the correctness of the account of an Indigo Factory,—*i. e.*, an account containing cross-items and fixing the balance due, furnished to him by the Factory,—sufficient, without his signing such account, to create or renew a fresh liability, with reference to the Law of Limitation, for items which would otherwise have been barred by limitation.” On this reference, judgment was pronounced by the High Court to the following effect: “If any new cause of action arose to the plaintiff upon the alleged adjustment, the suit in respect of it, would be subject to the limitation provided by Clause 9, Section 1, Act XIV of 1859, and in this view, the plaintiff’s suit having been brought more than three years from the breach of the contract then made, is wholly barred by limitation. In respect, however, to the point referred, we think that where two persons have dealings with one another, like those which we understand to have passed between the plaintiff and the defendant in this case,—that is, on the one side advances of money or seed for the cultivation of indigo, on the other, delivery of the indigo grown according to the terms of the contract,—a mere verbal admission by the cultivator of the correctness of the account has not the effect of creating or renewing any liability with reference to the Law of Limitation. The old debt, if any, and the old limitation remain. If the debt is reduced by deducting, with the consent of the cultivator, the value of the indigo plant delivered, this deduction gives no new period of limitation to the right of suit for the balance. Nothing short of a written acknowledgment that the balance is due, has, under Section 4, Act XIV of 1859, this effect. But where the transaction between the parties terminates in a new and distinct contract relating to the balance of account as itself constituting a debt independent of the original items, the right of suit in respect of such contract

will have its own period of limitation, which should, of course, be calculated without reference to any prior right which may have existed. Whether such a contract has or has not been entered into, is a pure matter of fact, for the decision of the Court, and which may be established by oral evidence."

In the case of *Nobin Chunder Sahoo v. Suroop Chunder Doss*, 6 W. R. 328, the cases of *Doyle v. Khooseal Khan*, and *Doyle v. Allum Biswas* were referred to by the Court as establishing that when the cause of action as laid in the plaint arises upon a statement and settlement of accounts, the suit must be brought within three years, since a suit upon an account stated is an action upon a breach of contract within the meaning of the Clause under notice. See also, *H. D. Tripp v. Kubeer Mundul*, 9 W. R. 209, to the like effect. It may be doubted, however, whether the case of *Doyle v. Allum Biswas* does, in fact, support this view, since it would there seem to have been decided that a mere settlement of accounts, although accompanied by a verbal admission on the part of the defendant of their correctness neither creates a new obligation, nor interrupts the operation of limitation as against the original debt. To the same effect see also *Ramnarain Chowdhry v. Bhugwan Joogey*, Mof. S. C. Ct. Ref. p. 92.

The ruling in *Doyle v. Allum Biswas* was followed by a Full Bench of the Agra High Court in the case of *Kunhya Lall v. Bunsee*, 1 Agra, F. B. 94, in which the plaintiff sued for money due on a balance of account. It appeared that all the items of the account were of sums of money lent in the month of June 1862, excepting one entry of cash advanced in July 1865. The defendant pleaded that the suit, which was not brought until the year 1867, was barred in respect of all the items except the last. The plaintiff, on the other hand, contended that as on the date of the last loan, accounts had been made up, and a balance struck against the defendant which he verbally

admitted to be correct, the cause of action should, in accordance with decisions of the late Agra Sudder Court, be taken to have arisen from the date of the adjustment, and that in this view the suit was in time. It was held, overruling the earlier decisions, that the mere adjustment of accounts does not give rise to any new cause of action. The Court said :—" The plaintiff's original cause of action arose in 1862, when he made the loans. Any right of suit which he may now possess can arise only in one of two ways, namely, by showing that his original right has been kept alive by a written acknowledgment within Section 4 of Act XIV of 1859, or that a new cause of action has arisen under a new and distinct contract. But the transaction of July, 1865, was neither an acknowledgment within Section 4, nor a new contract. All that then occurred was, that a balance was struck in the defendant's presence, and was verbally admitted by him to be correct. The express terms of the law prevent this oral admission from having any effect to revive the old cause of action. To give effect to the transaction as one which amounted to a new contract would, in truth be to defeat this provision of the Act."

Similarly, in the case of *Subharama v. Eastulu Muttusami*, 3 Mad. 378, it was held by the Madras High Court that where a settlement of accounts amounts merely to a verbal acknowledgment of the debt, such settlement affords no new cause of action from which a new period of limitation begins to run; but that where the settlement of accounts amounts to a new contract, a fresh period of three years will be allowed under this Clause, for instituting a suit. The facts appearing in this case, which resembled those appearing in the case last cited, were held not to constitute a new contract.

SECTION 1, CLAUSE 10.

To suits brought to recover money lent or interest or for the breach of any contract in cases in which there is a written engagement or contract and in which such engagement or contract could have been registered by virtue of any Law or Regulation in force at the time and place of the execution thereof--the period of three years from the time when the debt became due or when the breach of contract in respect of which the action is brought first took place, unless such engagement or contract shall have been registered within six months from the date thereof.

Limitation of three years.

Suits for the same where there is a written contract which has not been registered within six months.

ATTESTATION of a lease before a Cazeer is not a registration of it within the meaning of this Clause. *Nobonee Dabea v. Doya Moyee Dabea*, 1 W. R. 89. A *hatchitta* signed by the purchaser of goods, setting forth the quantity and price of the goods taken, is not a written engagement or contract within the meaning of this Clause. *Chunder Churn Paul v. Ramnarain Sein*, Coryton, 8.

A suit for damages arising out of the defendant's breach of contract in not giving the plaintiff a valid title to certain shares in immoveable property which he professed and agreed to sell, has been held to be governed by this, or by the preceding Clause, according as the contract has or has not been reduced to writing. *Rajnarin Singh v. Kooncur Dowlut Singh*, 6 W. R. 49. Compare *Dwarka Dass v. Ruttun Singh*, 2 Agra, 199. This Clause

will apply to a suit brought by a lessee against his lessor for breach of contract in repudiating the lease, *Pochooram Sahee v. Chotolall Sahee*, 8 W. R. 442; and to a suit by a lessee, for the value of trees which he had planted on the defendant's land, when, under the terms of his lease, he has a right to remove them on giving up possession. *Sayaji v. Umaji*, 3 Bom. A. C. 27.

A sued to recover a sum of money due to him by B, and obtained a decree payable by instalments. C intervened by a petition, covenanting that if the first instalment of the decree was not paid by B on a given date, he, C, would be liable for the whole sum due. No payment having been made by B, A sued C on the agreement in his petition. The suit was instituted more than three years from the date when by the terms of the decree and of the petition the first instalment became payable. It was contended for A that the limitation applicable to the case was that of six years under Clause 16, inasmuch as there was no express provision made in the Act for a suit of the kind. But it was held that as the suit was for the recovery of money due upon a written contract, it came within the provisions of Clause 10, and as the contract might have been, but was not registered, that the period of limitation was three years. *Gour Hurree Doss v. Muddun Mohun Biscas*, 11 W. R. 330.

As no period is fixed by this Clause within which suits may be brought for the breach of a written contract duly registered, or for the breach of a written contract which could not be registered by virtue of any Law or Regulation in force at the time and place of its execution, the limitation applicable to such suits is that of six years under Clause 16. *Chamar Ullah Sirdar v. Lokenath Hal-dar*, Mof. S. C. Ct. Ref. p. 40; *Velliapen Chetty v. Nootoo Thevan*, 2 Ind. Jur. 11; *Guriri Chetty v. Aiyappa Naidu*, 2 Mad. 329; *Carruthers v. Menzies*, Coryton, 40; *Boystub Churn Doss v. Premchand Mitter*, 4 W. R. 98.

In the case of *Kadarsa Rautan v. Rariah Bibi*, 2 Mad. 108, it was held by the Madras High Court that a writing containing a promise to pay money lent, with interest, and mortgaging certain lands as security for the amount, is a mortgage instrument, although possession be allowed to remain with the mortgagor, and consequently might have been registered under Section 3, Regulation XVI of 1802, of the Madras Code; and, further, that where such an instrument has not been registered, a suit for the recovery of the money lent, must be brought within three years pursuant to the provisions of this Clause. So likewise it has been held by the Calcutta High Court that a suit to recover the balance due on account of principal and interest upon an unregistered bond in which certain lands were mortgaged as security for payment, is governed by the limitation prescribed by this Clause, but that a suit to recover the lands mortgaged and to hold them as security for what may be found due on the bond as principal and interest, is governed by the provisions of Clause 12. *Lyster v. Ko Mihone*, 7 W. R. 354; and compare the cases cited *postea*, in the remarks on Clause 12.

The cases above cited, have reference for the most part to the Registration Laws which were in force prior to the passing of Act XVI of 1864. In all cases arising upon written contracts executed after that Act came into operation, and which under that Act, or under Act XX of 1866, the "Indian Registration Act" which has now taken its place, might have been registered, but have not been registered, the period of limitation will be three years. Section 17, Act XX of 1866, enumerates those instruments &c., of which the registration is compulsory; Section 18, those whereof registration is optional; Section 22 fixes a period of four months as the time within which instruments which must be registered shall be registered; Section 23 fixes a period of two months for registering documents of which the registration is optional; Sections 24, 25, 26 and 28

contain other provisions relating to the time within which registration must take place; Section 27 provides that "In Act XIV of 1859, Section 1, Clause 10, the last clause shall be read as if for the words 'within six months from the date thereof,' the words 'within the time prescribed in that behalf by the Indian Registration Act, 1866,' were substituted." Section 51 provides that "suits to recover money lent, or interest, or for the breach of any contract, may be brought within six years from the time when the cause of suit arose, in every case in which there is an engagement or contract in writing, provided that such engagement or contract be duly registered under this Act." These provisions will of course operate only in those territories to which the Registration Act has been extended.

SECTION 1, CLAUSE 11.

To suits in cases governed by English Law
Limitation of 12 years. upon all debts and oblig-
Suits for specialty debts ations of record and spec-
and legacies. ialties; and to suits for the
 recovery of any legacy—the period of twelve
 years from the time the cause of action arose.

IN the case of *Jussorut Khan v. Kangeloll Dey*, reported in the "Indian Daily News," of the 13th August, 1866, the plaintiff sued the defendant in the Calcutta Court of Small Causes upon an unsatisfied judgment of that Court, dated the 13th March, 1860. By Rule No. 34 of the "Rules of Practice for the Calcutta Court of Small Causes," drawn up under the provisions of Section 41, Act IX of 1850, it is provided that "no warrant of execution shall issue upon any judgment or order of the

Court after the expiration of three years from the date of such judgment or order, but that the parties in such a case shall institute a suit or action *de novo* on such unsatisfied judgment or order." The plaintiff's suit was brought in conformity with the above Rule upon the 27th February 1866. It appeared at the trial of the case, that no attempt had been made by the plaintiff to execute his original judgment after the 6th October 1860, when he took out a body-warrant, which was returned unexecuted on the 8th November of the same year. The defendant treating the plaintiff's claim as in reality nothing more than an application for enforcing the original judgment, pleaded limitation under Section 20, Act XIV of 1859, on the ground that no proceeding had been taken to enforce the said judgment within the three years next preceding the application. For the plaintiff on the other hand it was contended, that the suit must be considered to be a "suit upon a debt of record in a case governed by English Law," within the meaning of Clause 11, Section 1 of the Limitation Act, and so governed by the twelve years rule of limitation. The Small Cause Court Judge being of opinion that the claim was, as urged by the defendant, in reality no more than an application for enforcing execution of the original judgment by a procedure analogous to the English procedure by revivor, held that the suit was barred under Section 20 of Act XIV of 1859. But the question having been referred for the opinion of the High Court, the view taken by the lower Court was held to be erroneous. PHEAR, J. said:—"The Judge considers this suit as nothing more than a revivor of the original suit. Now I take it to be beyond dispute, that the final judgment of a competent Court, whether of record or not, constitutes an original cause of action. In *Williams v. Jones*, 13 M. & W. 628, which was a suit brought on a judgment of an old County Court, Baron Parke says;—"The principle on which this

action is founded is, that where a Court of competent jurisdiction has adjudicated a certain sum to be due from one person to another, a legal obligation arises to pay that sum, on which an action of debt to enforce the judgment may be maintained. It is in this way, that the judgments of Foreign and Colonial Courts are supported and enforced, and the same rule applies to inferior Courts in this country, and applies equally whether they be Courts of Record or not.' Later cases, doubtless, have decided that judgments of the modern County Courts cannot be sued on, but that is because there are peculiarities in the nature of the judgments of these Courts which cause them not to be final. But the reason of the exception is to be found solely in the terms of the modern County Court Act. I find no reason of a like kind in the Act constituting the Calcutta Court of Small Causes, to make its judgments fall short of a cause of action, and moreover it appears that in Rule No. 34, the Court itself recognizes its own judgments as a good and sufficient cause of action for a new suit. I consider the cause of action which was sued upon in this case to be the judgment of the 13th March 1860, and that it first arose on that date. The question then put to me comes to this, whether this is such a cause of action as falls within Clause 11, Section 1, Act XIV of 1859. I certainly think that the cause of action sued on is 'an obligation of record' in the strict sense of the word. But it has arisen as between a Mahomedan and a Hindoo. They are not persons entitled to the personal privilege of having exclusively English Law administered to them. It, therefore, seems to me that this case does not come within the category of cases intended by the words 'cases governed by English Law.' I am of opinion that the words of the Clause which refer to English Law, do not mean merely the Law formerly administered by the late Supreme Court, or now by the High Court sitting as a

Court of ordinary original civil jurisdiction, but are intended to point out a class of cases, in which, as between the parties, exclusively English Law must be administered. Clearly this is not one of that class of cases." The case was accordingly returned to the Small Cause Court Judge with an intimation of Mr. Justice Phear's opinion, that it was not governed by the provisions of Clause 11, Section 1 of Act XIV of 1859, but that it might fall to be disposed of as a suit for which no period of limitation was expressly provided, under Clause 16 of the same Section and Act. Assuming the correctness of this decision it would seem to follow that a different period of limitation will apply to suits on debts of record or specialty where the parties are Hindoos or Mahomedans from that which will apply in similar suits between certain other classes of litigants in respect of whom exclusively English law is to be administered. It may be doubted whether it was intended by the Legislature to introduce such a distinction in an Act avowedly framed with the object of securing uniformity.

SECTION 1, CLAUSE 12.

To suits for the recovery of immoveable
Limitation of 12 years. property or of any interest
Suits for immoveable property. in immoveable property to
 which no other provision of
 this Act applies—the period of twelve years from
 the time the cause of action arose.

LIMITATION cannot be applied under this Clause to a suit for a declaration of title, when the plaintiff is in possession of the lands in respect of which the declaration is sought. *Pureejan Khatoon v. Bykant Chunder Chuckerbutty*, 7 W. R. 96.

A cause of action on which a suit for recovery of immoveable property may be brought, arises whenever the rights of an owner are invaded by another party taking adverse possession of such property. A plaintiff suing to recover possession of lands from which he alleges that he has been dispossessed by the defendant, is bound, under Section 26. of Act VIII of 1859, to state as accurately as he can the date of his dispossession. *Boydonth Surmah v. Ojan Beebee*, 11 W. R. 238. In such a suit, the Court will have to determine not merely the date when the plaintiff's own right to sue accrued, but the date upon which the cause of action arose to the person through whom he claims. *Motee Lall Ghose Mundul v. Bhiloo Mundul*, 9 W. R. 251. A finding by the Court that the plaintiff had possession "of late years," is not a distinct finding. *Bhugwan Chunder Nundee v. Kedarnath Acharjee*, 2 W. R. 153; *Ram Ruttun Roy v. Komul Narain Roy*, S. D. 1860, vol. 2, p. 338. Where the plaintiff's cause of action arises on an alleged dispossession the *onus* lies upon him to show that he himself, or some one through whom he claims, has actually had possession within twelve years before the institution of the suit. No proof of anterior title in the plaintiff, such as would be involved in the decision of a question of boundaries in his favour, can relieve him of the burthen of proving that he was in possession within twelve years prior to suit, or shift it upon his adversaries, so as to compel them to prove the time and manner of his dispossession. *Koomcar Nitrasur Singh v. Nund Loll Singh*, 8 Moore's I. A. p. 199. This decision although pronounced with reference to the provisions of the old law of limitation, has been constantly followed in dealing with cases arising under Act XIV of 1859.*

* As to the *onus* of proof in suits for possession, where the cause of action is alleged to have accrued on a dispossession within twelve years prior to suit, reference may be made to the following cases :—*Issur Chunder Biswas v. Bissumbhur Biswas*, W. R. 1864,

Where a plaintiff has failed to obtain possession of lands which he alleges were included in an estate purchased by him by private sale more than twelve years before the institution by him of a suit against his vendor for possession, it has been held by the Agra High Court, that the claim is barred by limitation. *Ungnee Lall v. Hoolasee*, 1 Agra, 110.

A plaintiff sued for possession of certain lands, which he alleged had been purchased by him at a sale in execution of a decree, and had been delivered to him by proclamation of sale in accordance with the provisions of Section 264 of Act VIII of 1859. As it appeared that in fact he had never got actual possession, it was held that the alleged possession under the proclamation of sale was, in reality, no possession at all, and would not prevent the operation of limitation. *Ramchand v. Munshi Jowahir Ali*, 2 Ben. AP. 29.

The circumstance of a survey award having been made in favour of A, the award not having been followed by possession, is no answer to a plea of twelve years adverse possession by B, subsequent to the date of the award. *Jugut Chunder Roy v. Alyat Chinaman*, 5 W. R. 242. Where in a suit for the recovery of immoveable property, the cause of action is shown to have arisen more than twelve years before the institution of the claim, the fact that the plaintiff claims as a lessee under Government does not take the case out of the operation of this Clause, or bring it within the reservation of Section 17 of the

p. 107; *Tara Singh v. Chaida Mull*, 2 Agra, 177; *Mohesh Chunder Paulit v. Kedarnath Mookerjee*, 1 W. R. 67; *Nawab Nazir Sidhee Nuzeer Ali Khan v. Oomesh Chunder Mitter*, 2 W. R. 75; *Surahutoonnissa Khanum v. Mirza Muhomed Hossein*, 2 W. R. 89; *Gooroodoss Roy v. Huro-nath Roy*, 2 W. R. 246; *Ram-chunder Deo Bukshee v. Jugodumba Chowdhraim*, 6 W. R. 327; *Boolee Singh v. Hurobuns Narain Singh*, 7 W. R. 212; *Nobokissore Dey v. Ramkissen Mohurir*, 9 W. R. 131; *Dinobundhoo Sahaye v. Furlong*, 9 W. R. 155; *Ram Lochun Chowdhry v. Joy Doorga Dossee*, 11 W. R. 283.

Act. *Assoo Meah v. Rajoo Meah*, 10 W. R. 76 ; *Gunga Gobind Mundul v. The Collector of the 24-Pergunnahs*. 7 W. R. P. C. 21.

A plaintiff sued for possession of certain lands, resting his title on a deed of sale executed more than twelve years before the institution of the suit. The defendant admitted the *factum* of the deed of sale, but pleaded that the purchase was really his, although made *benami* in the name of the plaintiff who had never held possession. It was decided that it was for the plaintiff to prove his possession within twelve years prior to the date of suit. *Kadumbinee Dabea v. Kedarnath Mahatab*, 10 W. R. 239.

Where several plaintiffs put forward a joint claim for possession of immoveable property, and the issue of limitation is raised, the plaintiffs must establish that they have had a joint enjoyment of the property within the period of limitation. It will not be enough that one of the plaintiffs proves his separate enjoyment of the property. *Nundoram Koolal v. Ram Komul Chuckerbutty*, 10 W. R. 262.

Where a plaintiff sued for possession of a share in a certain estate, and the defendant, the purchaser at an execution sale of the right, title and interest of A in the said estate, pleaded limitation, alleging that A had for upwards of twelve years been the sole apparent owner of the property ; it was decided that as according to a will under which A held the property it belonged not to him alone, but to him jointly with the other parties named in the will, it was to be presumed that A held for all persons interested under the will, and not for himself alone, or adversely to the other persons lawfully interested, and that the rights of the plaintiff as a co-sharer under the will were consequently not barred by limitation. *Samuel v. Shaikh Moula Buksh*, 2 Hay, 37. It may, however, be doubted whether in this case it was not incumbent upon the plaintiff to show that A's

possession was really a possession in his, the plaintiff's, behalf, and that, through A, he had within twelve years before the institution of his suit, been in actual or constructive possession or enjoyment of the lands.

In respect of alluvial lands adverse possession may commence from the time when the lands are formed, and does not necessarily date from the time when they become culturable. Any proved act of ownership will be sufficient to show possession. *Luckhee Dabee Chowdhrair v. The Collector of Mymensingh*, 7 W. R. 231. But where such lands have not been actually occupied by any one, possession will be presumed in favour of the owner of the adjacent lands. *Kurimoonissa v. Sunnud Ali*, 9 W. R. 124. Where a plaintiff after obtaining a decree for possession of certain lands, sued the same defendant for possession of alluvial accretions thereto, it was held that the plaintiff's cause of action in his second suit must be taken to have arisen, not from the date of the decree in respect of the original lands, nor from the date when he actually took possession thereof under that decree, but from the time when the alluvial accretion formed, and was settled with the defendant; and that as the plaintiff's second suit had not been brought within twelve years from that date, it was out of time. It was observed by the Court that under Act XIV of 1859, no extension of time could be allowed in bringing a suit for alluvial accretion, upon the ground that a suit for the recovery of the original lands has been pending. *Intadharee Hoklar v. Luchmee Narain Shaha*, 7 W. R. 89; affirmed on review, 7 W. R. 457.

A suit by a zemindar for possession, instituted while the old law of limitation was in force, against a putneedar with whom Government had settled certain alluvial lands, was held by the late Sudder Court to be barred, more than twelve years having expired from the date of the first or decennial settlement with the defendant. In this case the plaintiff contended that limitation ran only from

the date of the second or perpetual settlement of the lands with the defendant, but the Court was of opinion that as both settlements were based on the same grounds, time must count from the first. *Mahtub Chunder v. Gobind Chunder Chuckerbutty*, S. D. 1848, p. 797.

A plaintiff sued for possession of certain lands alleging that they had formerly belonged to his estate, but had been submerged at the time of settlement. It was held by the Agra High Court that if the plaintiff could show that the submerged lands had formed a portion of his estate, and could establish the identity of the submerged lands with those which he claimed, his suit would not be barred, unless it appeared that some one else had been in adverse possession for twelve years before the institution of the suit. *Hur Sahai v. Mahomed Daim Khan*, 2 Agra, 64.

The following decisions may be referred to as showing that a temporary exclusion from possession during settlement proceedings, does not amount to an adverse possession as against the party excluded so as to bar his right to recover possession.

Where alluvial lands after accretion had been in the occupancy of A, up to the time when resumption proceedings, under Regulation II of 1819, terminating in a settlement in favour of B had been commenced, it was held by the late Calcutta Sudder Court that limitation would not operate against A by reason of his dispossession during the time the resumption proceedings were pending, but only from the date of their close. *Gooroopersad Rai v. Sunduloonnissa Beebee*, S. D. 1859, p. 470. A and B disputed the right to certain lands formed by alluvion. In the year 1835 the lands in dispute were resumed by Government, and after having been given to A in temporary leases, during the currency of which B received from the Collector a *malikana* allowance, they were eventually in 1859, declared by an award of the

Revenue Authorities to be settled with A in perpetuity. B thereupon instituted a regular suit for recovery of possession. A pleaded that as B had been out of possession for more than twelve years, his claim was barred : but it was held by the High Court that limitation would not apply, since A's holding under the temporary leases could not be considered adverse to B. *Monikurnika Chowdhraïn v. Kalichunder Chowdhry*, W. R. 1864, p. 149.

When a talookdar holding under a temporary settlement has that temporary settlement placed in abeyance by the Collector taking the collections into his own hands *khas*, the talookdar is not dispossessed thereby : his cause of action as for dispossession only accrues when a new auction-purchaser begins to collect. *Ram Monee Chowdhraïn v. Moulvie Myenooddeen*, 7 W. R. 182; *Gourkissen Deb v. Ramkanye Deb Roy*, 1 W. R. 55; *Ramaisher Singh v. Saïra Zalim Singh*, 2 Agra, 8.

Owing to the refusal of A, the original possessor of certain resumed *muaafi* lands, to fulfil the revenue engagements, a settlement was temporarily made with B, on the expiry of which, A sued to establish his right to settlement. It was held by the Agra High Court, that the possession of B under the temporary settlement made with him could not be considered adverse to the plaintiff's rights, so as to bar his suit. *Mahomed Mohiboollah v. Mahomed Ataoollah*, 1 Agra, 231. *Bhema v. Pahlad*, 2 Agra, 38; but see also *Tekait Pohkurrin Singh v. The Government*, 7 W. R. 465, which appears to be to the contrary effect. It has been held by the Agra High Court that the mere settlement of a resumed *muaafi* estate with a mortgagee does not necessarily make the holding by the mortgagee a holding adverse to the mortgagor's right. *Shah Baz Khan v. Ram Dial*, 1 Agra, 15; *Nizamoonnissa v. Oomrao Begum*, 1 Agra, 224.

It will be seen from the cases above cited that it is not every dispossession that gives rise to a cause of action

within the meaning of this Clause. This may be further illustrated. A having been for more than twelve years out of possession, forcibly took possession of certain lands and held them until dispossessed in summary proceedings taken against him by B under Section 15 of this Act. In a suit by A for recovery of possession he contended that limitation should be reckoned from the time he was dispossessed in the summary proceedings. But it was held that such dispossession afforded no new cause of action. *Golam Nubbee v. Bissonath Kur*, 12 W. R. 9.

The above is the case of a wrong-doer violently obtaining possession without the aid of law. But even where the party obtaining possession has not taken the law into his own hands, but has had possession given him under the order of a Magistrate, which a superior Court has subsequently found to be erroneous, it has been held that dispossession by the order of the superior Court affords no new cause of action to the person so dispossessed.* *Ranee Luckhee v. Mooktokashee Dabea*, 1 Hay, 306; *Sham Manjee v. Firinghee Sahoo*, 8 W. R. 373: compare *Anundnath Roy v. Degumbaree Dossee*, W. R. 1864, p. 43, and *Motee Singh v. Leelanund Singh*, 11 W. R. 49, in the latter of which cases it was held by LOCH, J. that dispossession under an order of a superior Court setting aside an order for possession erroneously passed by a lower Court, will not afford the party dispossessed a cause of action from which limitation can be reckoned.

Where one party has been in permissive occupation of land which belongs to another, although the period during

* This, at least, seems to be the inference to be drawn from the decisions cited. In the case of *Ranee Luckhee* it was said that "no wrongful possession under an erroneous order of the Magistrate could constitute such *bond fide* possession as would

suffice to prevent the law of limitation from running against the plaintiff," and that it would therefore be necessary "to look back to the period at which the plaintiff or his ancestor had been in *bond fide* possession."

which the latter had permission to occupy has expired, no cause of action arises on which the owner can maintain a suit for recovery of possession, unless it appear either that he has demanded and has been refused possession, or that his title has been denied by the permissive occupant. *Nund Coomar Bannerjee v. Phillips*, 8 W. R. 385; *Rewat Lall Singh v. Khuruck Dharee Singh*, 12 W. R. 167.

Under the old law of limitation, the mere non-payment of rent to a landlord whose title had once been acknowledged, was held not to operate as an adverse possession on the part of the tenant, so as to prevent the landlord from whom he derived his rights, from instituting a suit for the possession of the land for which rent had been withheld, or to warrant the exclusion of the land for which no rent had been paid from the landlord's estate. *Dost Mahomed Khan v. Watson*, 2 Hay, 4. In this case it was observed by the Court that in this country the doctrine 'once a tenant always a tenant' holds good; that no successful fraud or omission of a legal obligation on the part of a tenant can convert a tenant's right in land, which is admitted to have been within the estate of a proprietor, into a right of ownership; and that the law of limitation cannot be applied to such a case.

Under Act XIV of 1859, the same rule applies. Thus in the case of *Rajnarrain Dutt v. Gourmonee Dossee*, 6 W. R. 215, it was held that so long as the relation of landlord and tenant exists, no limitation, under this Clause, runs in favour of the tenant as against his landlord. The mere omission by a tenant to pay his rent does not constitute an adverse possession so as to make limitation applicable. *Mohima Chunder Muttuck v. Troyluckho Tarinee Dossee*, 7 W. R. 400; *Akbar Ali v. Mahomed Enayutoollah*, 2 Agra, 25. Nor does the mere denial by the tenant of his landlord's right, put an end to the relationship of landlord and tenant, so as to enable the tenant to treat his possession as adverse to his landlord. So long as the tenant remains

in possession, he is estopped from disputing the title of the person who put him in possession. *Radhabai v. Shama*, 4 Bom. A. C. 155. Consequently, where in a suit for recovery of possession, the defendant admits the right of the plaintiff as owner of the land in dispute, and acknowledges himself to be the plaintiff's tenant, he is precluded from afterwards pleading adverse possession or limitation. *Shristeedhur Mozoomdar v. Kalikant Bhutta-charjee*, 1 W. R. 171; *Shurut Soonduree Dabea v. Watson*, 7 W. R. 395.

Since there can be no adverse possession by a tenant as against his landlord so long as the tenancy continues, a landlord's cause of action in a suit to recover possession from a tenant only accrues from the time when he determines the tenancy. *Kazee Abdool Hamed v. Davis*, 8 W. R. 55. In this case it was observed that if a tenant from year to year of a farm, should sell the farm out and out to a stranger, the landlord would not be bound to sue, and could not sue the stranger so long as the tenancy continued. Compare *Indoo Bhoosun Deb Rai v. Huronath Rai*, 8 W. R. 135.

The ruling of TREVOR and CAMPBELL, JJ. in the case of *Jogendur Chunder Roy v. Huronath Roy*, 6 W. R. 218, to the effect that although the mere non-payment of rent by a tenant does not constitute an adverse holding, still if a tenant openly sets up an adverse title and holds adversely, limitation runs, might at first sight seem to be at variance with the opinions expressed by the Court in the cases above cited. But it would appear from the tenor of the rest of the judgment in this case that there had been no admission of tenancy on the part of the defendant, who claimed to hold adversely as a lakherajdar.

Where in the year 1865, a plaintiff sued to recover possession of certain lands which he claimed to have purchased in 1855, and which he alleged the defendant had held under an *ijara* which expired in 1858, and the

defendant pleaded a prior purchase from the same vendor in 1850, and that the plaintiff's suit was barred by limitation; it was held that if the defendant really had possession under an *ijara* which expired in 1858, and had paid rent under that *ijara*, the plaintiff's suit, which was brought within twelve years from the date on which the *ijara* expired, was not barred by limitation. It was remarked, however, that the *onus* of proving the defendant's holding under the *ijara* lay upon the plaintiff. *Mahomed Yasin v. Mahomed Ahsan*, 9 W. R. 106.

A plaintiff suing to establish proprietary right as against a *mokurrureedar*, is not bound to prove that he has been in actual possession within twelve years before action brought, since if the defendant has held as *mokurrureedar* under the plaintiff, the plaintiff's rights are not barred by limitation. *Protab Narain Mookerjee v. Kartick Chunder Mookerjee*, 10 W. R. 192.

It has been held that limitation cannot be applied to the suit of a zemindar for recovery of possession of lands to which the defendant alleges a *mourussee* title derived from another zemindar, until it be proved that the holding through such other zemindar is a genuine one. *Shristeedhar Mozoomdar v. Gopal Chunder Mundul*, 1 W. R. 172; *Hurochunder Chowdhry v. Raj Luckhee Chowdhraïn*, 1 W. R. 172. In this last case it was observed that, where the real point in dispute is the validity of the subordinate tenure set up by the defendant, limitation is not applicable. It may, however, be doubted whether the view expressed by the Court in these two cases is altogether correct. It is submitted that in both, the *onus* lay with the plaintiff to establish that the defendant had held under him, or under those through whom he claimed, and that if he failed in doing so, the possession of the defendant would be adverse, whether the holding under another zemindar was proved or not.

Where the relationship of landlord and tenant is not

shewn ever to have existed between the plaintiff and defendant, payment of rent by the defendant to another zemindar operates as an adverse possession to the plaintiff. *The Rajah of Burdwan v. the Government*, 2 Hay, 384. As to what in this country may be taken to constitute the relationship of landlord and tenant, see the case of *Kishen Kishore v. Netyanund Ghose*, W. R. 1864, x. p. 82.

In a suit in which the plaintiff sought to recover possession of certain lands, and the defendant pleaded limitation, the lower Court, treating the defendant as a "squatter," over-ruled the plea, upon the ground that as between a proprietor and a party in occupation of his estate the law of limitation did not apply. But it was held by the High Court on appeal, that as it appeared from the evidence that the defendant was a hostile claimant alleging a proprietary right which she had endeavoured to make good by various litigations, her occupation of the lands in dispute for twelve years prior to suit without payment of rent, constituted good ground for the plea of limitation. *Kalinath Bhattacharjee v. Lall Beebee Chowdhraïn*, 2 Hay, 487.

Where it appeared that a plaintiff, the owner of certain lands had abandoned them for upwards of twelve years, and that the defendant had, for a considerable period, been in possession, having planted trees and built a house, it was held by the Calcutta High Court on the authority of the preceding case, that the defendant's possession had been adverse, and that his plea of limitation under this Clause must prevail. *Kalichurn Roy v. Oopendronath Roy*, 8 W. R. 394.

In a suit for rent, it appeared that for more than fifty years the defendant had been holding the land in respect of which rent was claimed without paying rent, that he had not only not paid rent, but had constantly denied the plaintiff's title to claim it from him, and had in more than one proceeding successfully resisted payment. It was held by

the Agra High Court that the defendant's possession must be taken to have been adverse, and that limitation applied. *Kirpa Shunkur v. Pal Pandey*, 1 Agra, R. A. 47. Similarly, where a plaintiff sued to recover lands attached to certain villages of which he had recently become proprietor, and it was found that the defendants had been in possession for upwards of fifty years before the commencement of the suit, it was held by the Madras High Court that as the defendants' possession was manifestly hostile to the former proprietors through whom the plaintiff claimed,—since they must have been aware of the possession by the defendants of lands situated within the boundaries of their villages, and there was no ground for believing that the defendants' possession was merely permissive,—the plaintiff's suit was barred. *Narayana Chodanghi v. Venkata Pantulu*, 2 Mad. 391.

A, a zemindar, granted a putnee of certain lands to B, which putnee was subsequently sold for arrears of rent and bought in by A free from encumbrances. On taking *khas* possession, A discovered that the lands had, during B's tenure, been encroached upon, and partly appropriated by C, and, thereupon, instituted a suit against C for recovery of the land so appropriated. It was admitted that C had been in possession for more than twelve years before the institution of A's suit. Under these circumstances it was held by BAYLEY, J., that C's possession was adverse to A as well as to B, from its commencement, and consequently that limitation applied. But a contrary view was taken by PHEAR, J., who held that A's cause of action only arose on his purchase of the putnee at the auction sale for arrears, and that the suit having been brought within twelve years from that date was in time. And this view was confirmed on appeal by a Bench of three Judges, the Court being of opinion that the cause of action to A, who was a purchaser of the estate free from encumbrances, against C, who was

a trespasser, and had encroached against B, the defaulter, must be taken to have accrued at the same time as A's right to turn out under-tenants of the defaulter, *i. e.*, from the time of the purchase of the tenure of the defaulter; and that the fact of A being both talookdar and purchaser, did not prevent him from exercising the same rights as any other purchaser would be entitled to exercise. *Oomesh Chunder Goopto v. Rajnarain Roy*, 8 W. R. 444, 10 W. R. 15.

In a suit to establish a right of possession to lands, it was held by the Court of first instance that inasmuch as the lands in dispute had been lying waste for a period of forty or fifty years, they had not during that time been in the possession of the plaintiff, and that his suit was consequently barred. But it was held on appeal that until there was adverse possession, there was no cause of action, and that, consequently, the suit was not barred if brought within twelve years from the time when adverse possession was actually taken. *Eshan Chunder Rai v. Kali Koomar Rai*, 2 W. R. 135. To the same effect see also *Doorga Soonduree Dabee v. The Collector of Rajshahye*, 2 W. R. 210, in which it was held that in the case of jungle lands no adverse possession, such as would properly admit of the application of the law of limitation, arises until actual adverse possession is taken.

In the case of *Watson v. The Government*, 3 W. R. 73, argued before a Full Bench of five Judges, various questions as to the applicability of the rule of limitation under this Clause to suits by a landlord against his tenant, in respect of encroachments by the latter, and to cases in which a right to the possession of waste and uncultivated lands is sought to be established, received much attention. It was observed in this case, by PEACOCK, C. J., that "although it may be difficult in many instances to prove the actual possession of jungle lands, it is still possible to do so. The marks of possession with regard to property depend on the nature of the property, and it is not

necessary in order to prove possession, to prove an actual bodily continuous possession. The exercise of such acts of ownership over jungle lands, as would ordinarily be exercised over property of that nature, would be evidence of possession. For instance, if it were proved that the defendants were in the habit of cutting or preserving the wood, gathering wax or wild honey, collecting sticks, lac, &c., such acts might be evidence of ownership or possession; and those who have to deal with the facts of the case would have to determine whether such acts were referable to the right of property or possession, or were acts referable to a mere right of easement independent of possession."

In disputes between private owners with respect to encroachments, the right to sue for recovery of possession belongs to the owner whose property is encroached upon; but should he suffer his right to be barred by limitation, the practical effect is the extinction of his title in favour of the party in possession. *Gunga Gobind Mundul v. The Collector of the 24 Pergunnahs.* 7 W. R. p. c. 21. In this case their Lordships of the Privy Council observed:—"It is of the utmost consequence in India that the security which long possession affords, should not be weakened. Disputes are constantly arising about boundaries and about the identity of lands. Contiguous owners are apt to charge one another with encroachments. If twelve years peaceable and uninterrupted possession of lands, alleged to have been enjoyed by encroachment on the adjoining lands, can be proved, a purchaser may take that title in safety."

It has been said that the words 'interest in immoveable property' as used in this Clause, must be taken to relate to an estate or interest less than the 'fee simple,'* which a party may have in the *corpus* of any such prop-

* The use of the term 'fee simple' to a right in immoveable property may be objected to as inapplicable in this country.

erty. *Lalla Gobind Suhaye v. Monohur Misser*, 1 W. R. 65. It was held in this case that the right of an owner of lands to rents appropriated by a party in wrongful possession is not 'an interest in immoveable property,' and consequently that the period of limitation which this Clause allows, does not apply to suits for the recovery of mesne profits. Such suits not being expressly provided for, fall within the general rule contained in Clause 16 of this Section, and must be brought within six years from the accrual of the cause of action. See *postea*, the cases relating to mesne profits cited under Clause 16.

A claim for the opening up of a water-course which the plaintiff alleged that the defendant had closed by constructing an embankment on his—the plaintiff's—land, has been held to be a claim for 'an interest in immoveable property,' and so governed by the limitation provided by this Clause. *Oodoyessuree Dabea v. Huro Kishore Dutt* 4 W. R. 107. Compare the cases cited *supra*, at pp. 81-83.

In the case of *Chetti Gaundan v. Sundaram Pillai*, 2 Mad. 51, the plaintiff sued for money due upon an unregistered instrument securing a principal sum with interest, pledging certain lands for payment of the amount, and providing that on failure in payment within three years, the lands should become the absolute property of the pledgee. The plaintiff also asked that the property pledged might be held liable for the debt. The suit was dismissed by the lower Courts as barred by Clause 10 of this Section, inasmuch as it had not been brought within three years from the period stipulated for the repayment of the money; but on special appeal, it was held by the Madras High Court that when land is hypothecated, the contract gives to the creditor 'an interest in immoveable property,' within the meaning of the Clause under notice, and that the period of limitation for actions on such contracts is twelve years. The Court observed that "the words 'to which no other provision of this Act applies'

must be taken to relate to interests in immoveable property for which no other provision is specially made, since it would be difficult to contend that Clause 10 might not, *prima facie*, apply to every interest in immoveable property arising out of a written contract. Clause 12 really applies to classes of interests not touched by Clauses 13 and 14 and other provisions of the same kind." It was likewise observed by the Court that while the remedy of the plaintiff in this case was not barred, in so far as his contract was one of hypothecation, his concurrent remedy of an action for the money lent was clearly barred, and that no redress could therefore be given him unless he proved, first, that there was an actual pledge of immoveable property, and secondly, that the property pledged was part of the estate of the debtor at the time of the pledge. On proof of this, the Court held that the proper decree was for the sale of the property hypothecated, unless the debtor paid the amount due with interest, within a period to be named. Compare *Kadarsa Rautan v. Rariah Bibi*, 2 Mad. 108.

Similarly, where a suit was brought upon a bond securing the payment of principal and interest, and the relief sought was, that payment might be enforced, both as a simple contract liability, and as a debt secured by collateral mortgage of immoveable property, it was held by the Madras High Court that the suit was one for the recovery of an interest in land, within the meaning of this Clause, and that the period of limitation was twelve years from the time when the debt became due. *Kristna Rau v. Hachapa Sugapa*, 2 Mad. 307; *Raja Kaundan v. Mutammal*, 3 Mad. 92; *Ramasamy Kon v. Bhavany Ayyar*, 3 Mad. 247. Compare *Golam Mahomed v. Surican Hossein*, 9 W. R. 170, decided by a Full Bench of the Calcutta High Court, and overruling the earlier decisions in the cases of *Parushnath Misser v. Shaikh Bundah Ali*, 6 W. R. 132, and *Sooruj Buksh Singh v. Seetul Singh*, 6 W. R.

318 ; *Lyster v. Ko Mihone*, 7 W. R. 354 ; *Munnoo Lall v. Pique*, 10 W. R. 379.

So, also, it has been held that where a creditor sues to recover money advanced by him on the deposit of the title deeds of land, his claim is governed by the limitation applying to the ordinary contract of loan ; but where he seeks to have his lien realized against the lands of which the title deeds have been deposited, his claim is for an interest in immoveable property, to which the twelve years' rule of limitation will apply. *Gobind Chunder Addy v. Peary Mohun Bose*, 10 W. R. 56.

A admitted B his brother, who had been adopted by C, to a share in their natural father's estate, on a verbal undertaking given by B that on his succeeding to the property of his adopting father, he would share it with A. In a suit by A to enforce performance of the agreement, it was argued that as the suit was for the recovery of an interest in land within this Clause, the period of limitation was twelve years. But it was held that the suit was in fact a suit upon a contract within Clause 9 of this Section, and that it was barred as not brought within three years from the time when B, on the death of his adopting father, took possession of his estate. *Mohadeb Lall v. Nundun Lall*, 12 W. R. 22.

The term *malikana* as used in Revenue language, denotes "an allowance assigned to a zemindar, or to a proprietary cultivator, who for some cause,—as failure in paying his revenue, or declining to accede to the rate at which his lands are assessed,—is set aside from the management of his estate, and from the collection and payment of the revenue to Government ; these offices being transferred to another person, or taken under the management of the Government Collector." The various views which have from time to time been put forward as to the limitation applicable to suits for enforcing payment of *malikana*, may be gathered from the following decisions.

In the case of *Heeranund Sahoo v. Oozerun*, 6 W. R. 151, the plaintiff sued the defendant for *malikana*, alleging that on a settlement made by the Government with the defendant's ancestor as *mokurrureedar*, a certain sum was remitted from the revenue payable under the settlement to provide for *malikana* to be paid to the plaintiff's ancestor. The plaintiff being unable to show that he, or those through whom he claimed, had received any payment from the defendant on account of *malikana*, within twelve years of suit, it was held by the lower appellate Court that the claim was barred. But on appeal it was ruled by BAYLEY and SUMBHOONATH PUNDIT, JJ., upon grounds which are not very clearly stated in their judgment, that the plaintiff's action was maintainable for all *malikana* which became payable within six years prior to the institution of the suit. On an application for a review of this ruling, 7 W. R. 336, it was held by the same Judges that the plaintiff's suit was clearly for a money debt charged on the estate, and that as such, it was governed by the provisions of Clause 13 of this Section; and that as there was no proof that the plaintiff, or those through whom he claimed, had within twelve years before the institution of the suit received any payment on account of *malikana* from the defendant, the claim was barred. On a second application for a review of the same judgment, 9 W. R. 102, it was held by BAYLEY and PHEAR, JJ., that the right to receive *malikana* is a proprietary right, and constitutes an interest in land of the nature of a rent-charge, and that, in this view, where there has been no enjoyment on the part of a plaintiff of *malikana* for twelve years, his right to sue for it is barred by the terms of the Clause under notice. The decision arrived at by the Court on the successive applications for review in the above case, to the effect that where a plaintiff allows his right to *malikana* to lie over without seeking to enforce it for twelve years, limitation will bar the claim, has been followed in

the case of *The Rajah of Durbangah v. Budurul Huq*, 10 W. R. 302. But in the most recent case reported on the subject, the Judges again differed as to the rule to be applied, it being held by KEMP, J., that the non-receipt of *malikana* for a period of twelve years, bars a suit for its recovery ; while GLOVER, J., was of opinion that *malikana* being of the nature of rent, the failure to pay it affords a constantly recurring cause of action, and enables a proprietor to sue for all arrears falling due within three years prior to suit. *Bhoobee Singh v. Nehmoo Bohoo*, 12 W. R. 46. As to a claim for recovery of *malikana* which has been annually drawn and set aside by the Government Collector, see *Roopnarain Singh v. The Government*, 2 W. R. 163.

Todá garás was originally a 'cash composition levied by the predatory chiefs in Malwa, Rajpootana, Guzerat and Cutch, from the inhabitants of villages in lieu of other claims or of plunder.' It would seem, in fact, to have been a species of 'black-mail,' but having received the sanction of the native governments, the right to it came to be regarded as an hereditary claim. In a suit brought by a plaintiff to establish his right to a *todá garás* allowance, and for arrears of it, it was held by the Bombay High Court that in the absence of special proof that the allowance claimed was a charge on land, it must be considered to be of the nature of moveable property, and the claim to it governed by the six years' rule of limitation of Clause 16 of this Section. *Maharana Fatesangji v. Desai Kalyanraya*, 4 Bom. A. C. 189.

In the Bombay Presidency, the word *hak̐k* is used as a legal term to denote a 'privilege, fee, perquisite, or grant claimable under established usage by officers of Government, village officers, &c.' It has been held by the Bombay High Court that suits for the recovery of *hak̐ks*, being of the nature of claims for money charged upon, or payable out of land are governed by the twelve years'

rule of limitation. *Bharatsangji Mansangji v. Naranidharaya Manasukharam*, 1 Bom. 186.

In a suit brought by a *mirasidar* to recover possession of *miras* land which his ancestor had resigned to Government, from a holder to whom Government had subsequently granted it, it was held by the Bombay High Court that the limitation to be applied was that provided by this Clause, and that it commenced to run against the *mirasidar* and his heirs from the time the *miras* land was resigned, and not from the date of the subsequent grant of it by Government. *Arjuna valad Bhiva v. Bhavan valad Nimbaji*, 4 Bom. A. C. 133.

Various questions have arisen as to the manner in which limitation under this Clause is to be applied in a suit brought by a reversionary heir in respect of alienations made by a childless Hindoo widow, or other Hindoo woman having an estate similar to that of a childless widow, during her tenure of the estate which she has taken as heiress.* If a widow for other than allowable causes alienates property inherited from her husband, or if she wastes it, her act does not destroy her right, or vest the property in the reversionary heir. The alienation is valid for her lifetime, but the reversioner, without waiting for her death, may sue to obtain a declaration that the alienation is not binding except for her life, and also to prevent waste. *Gobind Monee Dossee v. Sham Lall Bysack*, W. R. sp. 165; *Ram Monohur Singh v. Kooldeep Narain Singh*, 11 W. R. 514. A suit by a reversioner during the lifetime of the widow for possession of land on the allegation that she is improperly alienating it, will not lie, since he who has not a present right to possession, cannot sue to eject. *Bangaraiya v. Bala-*

* As to the nature of the estate taken by a Hindoo widow in the immoveable property of her deceased husband, and the effect to be given to conveyances by her,

reference may be made to Mr. Macpherson's work on Mortgages, 5th ed. pp. 24-32, and to the authorities there cited.

bhadra Razu, 2 Mad. 386. Where a reversioner seeks during the widow's lifetime to have his right of inheritance declared, his prayer is premature, since it may be that he will not survive the widow. What the reversioner is entitled to, is a declaration that upon the death of the widow, the right of inheritance will attach as if she had never made any alienation. *Rughoobuns Sahaye v. Phool Chund Lall*, 9 W. R. 108; *Roonta v. Jeeurun Ram*, 1 Agra, 240.

Where a reversioner, during the lifetime of the widow, seeks for such a declaration in respect of deeds of alienation executed by her, or of a sale made by her, he must institute his suit within twelve years from the time when the deeds were executed or the sale took place. *Burmessur Nauth v. Rasbeharee Lall*, 10 W. R. 30; *Mohendronath Bose v. Syud Amir Ali*, 2 W. R. 271. But the rule of limitation which applies to a suit by a reversioner during the lifetime of the widow, does not affect his right to sue for possession when the succession opens out to him on the widow's death, since he is then entitled to the property in a different capacity, with reference to which his cause of action must be taken to arise from the death of the widow. *Chunder Sheekhur Roy v. Nobin Soondur Roy*, 2 W. R. 197. Where a reversioner sues to recover lands which he alleges have been wrongfully made over to the defendant by a Hindoo widow during her incumbency, limitation runs against him not from the date of the act which he seeks to set aside, but from the death of the widow, or, if the plaintiff is at that time a minor, from the date of his majority. *Seeboopersad Doss v. Afrunnissa*, 2 Hay, 477; *Phoolman Roy v. Tiluck Roy*, 7 W. R. 450; *Sheo Gobind Sahoo v. Ram Sheeruck Roy*, 8 W. R. 519; *Balasee Kooncur v. Suntokhee Thakoor*, 10 W. R. 276; *Gopal Mullick v. Onoop Chunder Roy*, 11 W. R. 183.

On the death of a Hindoo widow who had alienated lands which she had inherited from her deceased husband, the reversionary heir sued to have her alienations set aside and

for possession. It was contended for the defendant that the plaintiff's title had accrued during the lifetime of the widow under a deed of gift from her, upon which he had sued and been nonsuited more than twelve years before the suit to set aside the alienations was instituted, and that consequently the claim was barred. But the Court held that the plaintiff's title as reversionary heir was distinct from that accruing under the alleged deed of gift, and that in respect of his reversionary title, limitation ran only from the death of the widow. *Anund Mohun Roy v. Chundermonee Dossee*, 2 Hay, 648. Compare *Indurjeet Koonicar v. Deorancee Koonicar*, 12 W. R. 234.

As to the time when a cause of action is to be taken to have accrued to a reversioner who seeks to recover the lands of his ancestor by setting aside an adoption made by a Hindoo widow, reference may be made to the conflicting cases cited *supra*, pp. 50-52, and to the more recent decision of a Full Bench of the Calcutta High Court in the case of *Sreenath Gangooly v. Mohesh Chunder Roy*, decided on the 2nd September, 1869, in which it was held that a suit of the kind would not be barred if brought within twelve years from the death of the widow.

A Hindoo widow in possession of the estate of her deceased husband had transferred it to her daughter the next heir. A reversioner, during the lifetime of the widow, sued to set aside the transfer, and to establish his right to, and obtain possession of the estate as upon an improper and unauthorized dealing by the widow therewith. It was held by the Agra High Court that as the mother's relinquishment in the daughter's favour did not prejudice the plaintiff's reversionary right, his action could not be maintained. *Udhur Singh v. Ramee Koonour*, 1 Agra, 234.

A Hindoo widow, waiving her life interest in the estate of her deceased husband, ceded the estate to A at that time her husband's next heir. On the death of the widow, the then reversionary heir sued the

descendants of A, who were in possession of the estate, for recovery of possession, contending that his cause of action arose only on the widow's death. It was held by a Division Bench of the Calcutta High Court that as in a former suit between the same parties, the widow's right to maintenance, as distinguished from a right to hold possession of the property in dispute, had been declared, and as it is undoubted law that a widow can relinquish her rights in favour of her husband's heir, the property must be taken to have vested in A from the time when it was ceded to him by the widow, and that her death gave no new cause of action to the plaintiff, whose suit not having been brought within twelve years from the time when the defendants came into possession, was barred. *Kashee Chunder Nag v. Kali Koomar Nag*, 6 W. R. 180. Compare *Rujoneekant Mitter v. Premchand Bose*, Marsh. 241; *Shurut Chunder Dutt v. Shama Soonduree Dossee*, 8 W. R. 500. It may be doubted, however, whether the relinquishment by the widow in favor of her husband's next heir would be valid without the consent of all the heirs of the husband alive at the time. See *Macpherson on Mortgages*, 5th ed. p. 27.

A Hindoo widow putting forward a pretended deed of gift from her husband, sold to the defendant lands in which she had only a life interest. The reversionary heir disputed the deed, and was directed by the Court to institute a regular suit for setting aside the sale, which, however he failed to do. The reversioner predeceased the widow: but his children, after the widow's death, within twelve years after they had attained majority,* but more than twelve years after the sale to the defendant, instituted a suit as reversioners for the recovery of the lands. The defendant pleaded limitation, urging that his possession must be taken to have been adverse to the plaintiff's father from the time when the latter disputed the deed of

* The suit was brought before Act XIV of 1859 came into operation.

gift put forward by the widow. But it was held that as no possession by or through a Hindoo widow, however it may have been acquired, can be adverse to the reversioner until his right to possession accrues, which does not happen until the widow's death, the claim was not barred. *Peary Mohun Roy v. Chunder Kant Roy*, Marsh. 33.

Lands inherited by a Hindoo widow from her husband were sold in execution of a decree against her for her personal debts. The purchaser failing to pay the Government revenue on other lands held by him, these, together with the lands purchased at the execution sale, were sold by the Collector at an auction sale to the defendant. A reversioner, the widow being then alive, sued to have this sale set aside, but his suit was dismissed as not brought within one year from the date of the sale, as prescribed by Section 24, Act I of 1845.* On the death of the widow, a suit for possession being brought by the same plaintiff, limitation under the same Section and Act was again pleaded. But it was held that as all that was or could be sold under the original decree was the widow's life interest in the lands, nothing more than that life interest could be purchased by the defendant at the sale for arrears of revenue; that on the widow's death, the defendant's interest in the lands through her terminated; and that neither the provisions of the Act referred to, nor the decision in the former suit could bar the plaintiff's suit for possession. *Doorga Churn v. Kassee Chunder Moitree*, 2 Hay, 646. Compare *Ramlall Sirkar v. Greesh Chunder Lahooree*, 1 W. R. 145; *Mohendronath Bose v. Syud Ameer Ali*, 2 W. R. 271.

In the case of *Ooma Churn Bannerjee v. Haradhun Mozoomdar*, 1 W. R. 347, the plaintiff sued for possession of certain lands on the allegation that they belonged to his maternal grandfather and maternal uncle, and after their death devolved on his grandmother. The defendant

* Repealed by Act XI of 1859.

pleaded limitation, calling upon the plaintiff to prove possession either by himself or those through whom he claimed within twelve years before action brought. This the plaintiff was unable to do, but contended that limitation did not begin to run against him until the death of his grandmother. Upon this point, the Court said :—" We are clearly of opinion that limitation does not bar the suit, because the cause of action arose only from the death of the grandmother who had the life interest." Compare *Kalee Churn v. Panchkourree Mahtoon*, 9 W. R. 490.

A distinction, however, is to be drawn between the case of a reversioner who sues on the death of a Hindoo widow for possession of property which has actually come into her hands, and which she has alienated, and the case of a reversioner who sues for possession of property which the widow has never actually held. In the latter case, the reversioner's cause of action cannot be taken to arise on the widow's death. *Ramdial Gossain v. Kattyaneec Dabea*, 8 W. R. 256; *Nobin Chunder Chuckerbutty v. Issur Chunder Chuckerbutty*, 9 W. R. 505. In the latter case, which was decided by a Full Bench of the Calcutta High Court, the following explanation was given of the grounds on which this distinction rests. Where a Hindoo widow sells lands belonging to the estate of her deceased husband without lawful cause, the purchaser entering into possession, is not a wrong-doer during her lifetime. No cause of action arises to the widow against him for entering under her grant, although the grant is not binding after her death as against the reversionary heirs. In such a case, a cause of action on which a suit to recover may be brought, arises for the first time when the succession opens to the reversioner on the death of the widow. But the widow fully represents the husband's estate and therefore possession which is adverse to her, is adverse to the estate generally. Hence, where possession of her husband's estate is withheld from the

widow, a cause of action at once arises, on which she may sue to recover possession. If in such a suit she should fail to make good her claim, then the reversionary heirs will be bound by the decision against her. *Kattama Nauchear v. The Rajah of Shiva Gungah*, 2 W. R. P. C. 31; *Nogendro Chunder Ghose v. Sreemutty Dossee*, 8 W. R. P. C. 17. If instead of bringing a suit for possession, the widow allows her rights to become extinguished by lapse of time, the adverse possession which bars her, bars also the reversionary heirs. *Goluckmonee Dossee v. Degumber Dey*, 2 Bourn. 193.

The ruling of the Full Bench in the case of *Nobin Chunder Chuckerbutty*, has been followed in the cases of *Pearee Lall Chowdry v. Brinda Dabee Choudhrain*, 9 W. R. 460, and *Gopal Singh v. Kanhya Lall*, 11 W. R. 9. In this last case, it appeared that on the death of Deen Dyal, who had been separate in estate from his brothers, his brother's sons, in the lifetime of the widow of Deen Dyal, had claimed and obtained possession of certain lands which had belonged to his estate. In a suit brought after the widow's death by a son of a daughter of Deen Dyal for possession of the lands by right of inheritance, it was held that as, under the Mitakshara law, by which the parties were governed, the widow was entitled to succeed on the death of her husband, the possession of the brother's sons was adverse both to her and to the reversioner, and as that adverse possession had extended over more than twelve years, the claim of the plaintiff was barred.

On the death of A, his two daughters B and C succeeded to his estate. B died in 1835; C in 1859. In 1867, the son of C sued for possession of a moiety of the lands which had belonged to A, and which he alleged had been alienated by B to the defendant, without lawful cause. It was held that as it did not appear that C had joined in the alienation made by B, the defendant's possession from the death of B was adverse to C, who on that event be-

came direct heir to all the property of A, and would have had a right of action to recover any portion of the estate which had been alienated without her consent; and that no new cause of action arose to the plaintiff on his mother's death. *Juggurnath Dutt v. Gunga Churn Roy Chowdhry*, 12 W. R. 97.

Several early decisions of the Calcutta High Court are not in accordance with the views expressed by the Full Bench in the case of *Nobin Chunder Chuckerbutty*, and must be taken to have been wrongly decided. Thus in the case of *Kummul Sha Bennick v. Ramjee Sha Bennick*, 2 W. R. 276, it was held that where after the death of a Hindoo, or of his widow, his daughter is entitled to succeed, but does not get possession, the sons of the daughter are entitled to sue for possession within twelve years from their mother's death, and to require the period of their minority to be deducted in reckoning limitation. With reference to this decision, it may be remarked that, on the death of the widow, the daughter had a present right to possession, and a cause of action to enforce it if withheld, against which limitation would run, and which could be in no way affected by the subsequent disability of the sons. Compare *Huro Chunder Chowdhry v. Gobind Koomar Chowdhry*, 7 W. R. 134.

The decision in the case of *Ramnarain Moiter v. Ramdoollub Sandyal*, 7 W. R. 453, would also seem open to question. A *putnee mehal* was bought by Ramruttun, and was devised by him to his son Gungagobind. Gungagobind survived his father but died childless and intestate, leaving a widow, Sibosoonduree. Neither Ramruttun, Gungagobind nor Sibosoonduree ever took possession of the *putnee mehal*. On the death of Sibosoonduree, the plaintiff, whose general title as nephew of Gungagobind to succeed to the estate of his uncle was not disputed, sued to recover possession of the *putnee mehal*. It was pleaded that the suit was barred as not brought within twelve years

from the date of the purchase by Ramruttun; but it was held upon the authority of the case of *Kummul Sha Ben-nick*, and of *Ooma Churn Bannerjee* cited *supra*, p. 173, that the plaintiff's cause of action did not arise until the death of Sibosoonduree. But it is clear that an adverse possession commenced from the time when Ramruttun failed to obtain possession of the lands he had purchased, and that limitation should have been reckoned against the plaintiff from that time.

In the case of *Chunder Nath Sein v. Anundmoyee Dossee*, 11 W. R. 289, it was held by a Division Court that where a daughter had taken possession of her father's estate after his death, but had subsequently been out of possession for more than twelve years, a suit by the reversioner for the recovery of the property, brought within four years from the death of the daughter, was barred. It does not appear from the report of this case under what circumstances the daughter had relinquished possession. The Court relied upon the decision of the Full Bench in the case of *Nobin Chunder Chuckerbutty*. But the cases are not analogous.

Soudaminee, the daughter of Ramnarain, a deceased Hindoo, sued for a declaration that the will of her father in favour of the defendant Bistoonarain, was invalid, and for possession of her father's estate as manager. It appeared that Kulyanessuree the widow of Ramnarain, had, on his death, instituted proceedings against Bistoonarain, in which she claimed the estate of her deceased husband, and that subsequently by a deed of compromise she had admitted the rights of Bistoonarain as devisee, and given up her own. The Court held that as against the daughter's suit limitation ran from the date on which the widow admitted the rights of Bistoonarain, and not from any prior date, since the widow during the pendency of her litigation with Bistoonarain, was protecting the interests of the daughter, who claimed to be the reversioner, who would not have been heard in the matter, and could have no

occasion to sue during the pendency of that litigation. *Soudaminee Dossee v. Bistoonarain Roy*, 8 W. R. 323. It would appear from the report of this case that Soudaminee's suit was brought during the lifetime of Kulyan-essuree. In the earlier case of *Ram Bunsee Kooncur v. Moheshur Kooncur*, 1 W. R. 338, it was held that a suit by a reversioner to set aside a deed of alienation purporting to have been executed by the plaintiff's ancestor, and supported by the widow, on the allegation that the deed was a fabricated one, could not be maintained during the widow's lifetime, but that the reversioner might, during the lifetime of the widow, bring an action to declare that the conveyance was not binding beyond her lifetime. Compare *Roonta v. Jeewun Ram*, 1 Agra, 240.

In the case of *Seeboopersad Dass v. Afrunissa*, 2 Hay, 477, it was held that a reversionary heir is not bound by a compromise entered into by a widow for the relinquishment in favour of a third party of a portion of her deceased husband's landed estate, and therefore that in a suit for the recovery of the lands so relinquished, limitation will not run against him from the date of the compromise but from the death of the widow.

A reversioner's cause of action against his ancestor's lessee does not accrue until the expiration of the lease, unless the reversioner be evicted, or deprived of his rent, or rent be received adversely to him from the lessee by a stranger. *Indhoo Bhoosun Deb Rai v. Huronath Rai*, 8 W. R. 135.

A having obtained a certificate under Act XX of 1841, for collecting the debts due to the estate of his maternal uncle deceased, sued certain tenants of lands belonging to the estate for rent. B intervening, A's suits were dismissed under the provisions of Section 77, Act X of 1859. More than a year after the decision in the rent cases, A instituted a suit against B for possession of the whole of his uncle's estate, alleging that he had been in possession thereof from the death of his uncle's widow, until dispossessed on B's

intervention in the suits for rent. B pleaded limitation under Section 77, Act X of 1859, on the ground that A's action had not been brought within one year from the decision in the rent cases; but it was held that the limitation under that Section only affected A's right to the extent of barring his claim to recover the rent sought for in the dismissed cases, the Court being of opinion that it could not have been intended that a decree for rent from one or two out of perhaps hundreds of ryots, awarded to an intervenor, should be considered as an estoppel to the right of the plaintiff to sue for the possession of the entire estate, should he not sue within one year from the date of such decree.* It was further held by the Court that although the plaintiff had failed to prove his alleged possession of the estate, still as his suit for possession was brought within twelve years from the death of his uncle's widow who had held the property, he was entitled to a judgment on establishing his right to succeed his uncle, since his cause of action did not arise until the death of the widow. *Chunder Sheekhur Roy v. Nobin Soondur Roy*, 2 W. R. 197.

Not unlike the questions which have arisen as to the mode of applying limitation in the case of suits brought by reversionary heirs to set aside alienations made by a widow, are those which have arisen in dealing with claims falling to be decided under the Mitakshara Law, brought by sons to set aside alienations wrongfully made by their fathers of ancestral property. In these cases also the decisions have not been uniform.

In the case of *Ram Gholam v. Gour Pershad*, S. D.

* Compare *Ram Komul Sein v. Prossunno Moyee*, 8 W. R. 294, in which it was declared to be the rule of law that when the object of a suit is directly to set aside an order passed under Section 77, Act X of 1859, the limitation of one year applies; but

that when a plaintiff sues on a general right to real property, the limitation is that of twelve years as provided by Clause 12, Act XIV of 1859. See, also, *Kundurp Narain Singh v. Bundoo Ram Sein*, 3 W. R. x. 6.

1845, p. 175, it was held by the late Sudder Court that in provinces where the Mitakshara law prevails, it is competent for a son, whose father has wrongfully alienated ancestral property, to sue, even during the lifetime of his father, for recovery of possession, as on an exclusive proprietary right. This ruling was, however, controverted in a subsequent decision of the same Court in the case of *Bikaoo Lall v. Chuttur Dharee Lall*, S. D. 1850, p. 282, in which it was held that while the father lived, a son could not, under the Mitakshara law, sue as on an exclusive proprietary right, for possession of lands which his father had improperly alienated. The Court, however, distinguished between such a suit, and one brought by a son to declare his father's alienations, made without consent, to be illegal and invalid; and it may be inferred to have been the Court's opinion that a suit brought in the latter shape might be maintained during the father's lifetime.

In the case of *Ramdyalnarain Singh v. Joolfeekur Hossein*, S. D. 1851, p. 352, the plaintiff sued for possession of certain lands on the allegation that they formed part of an ancestral estate which had been wrongfully alienated by his father, and for registration of his name as proprietor thereof. The lower Court dismissed the claim as not brought within twelve years from the time when the plaintiff's father had sold the lands in question, from which date the Court was of opinion that the plaintiff's cause of action must be deemed to have accrued. But this decision was reversed by the Sudder Court on appeal. The Court observed :—" Certainly a cause of action may have arisen at the time of the sale; that is, it is possible that a suit could have been maintained by the plaintiff during his father's lifetime, merely for the purpose of declaring the sale invalid or void. But he could not have brought the present action which is for possession and for registration of his name in the Collector's office as sole proprietor of the estate in dispute, until after his father's

death." The Court accordingly held that as the plaintiff could not have maintained the action as brought, during the lifetime of his father, his cause of action must be taken to have arisen at the date of his father's death. The same view was again followed by the Sudder Court in the case of *Sheosuhy Singh v. Gobind Roy*, S. D. 1857, p. 67.

In the case of *Beer Pershad v. Doorga Pershad*, W. R. 1864, p. 215, the plaintiff sued during his father's lifetime to set aside alienations made by his father, of ancestral property. The lower Court being of opinion that the plaintiff, who was a minor at the time of the alienations, was bound under the old law of limitation by which the case was governed, to bring his suit within twelve years from the time of his attaining majority, dismissed the claim as not brought within that time. On appeal, the plaintiff urged that as in accordance with the rulings of the Sudder Court above cited, a suit by a son for possession of ancestral property unlawfully alienated by his father is in time if instituted within twelve years from his father's death, it follows that if a son's right is not barred by his waiting till his father's death, no matter when that may happen, it cannot, while the father lives, be considered to be barred by reason of the son not having sued to enforce it within twelve years from the date of his attaining full age. But the High Court held that the decision of the lower Court was correct. It was observed that "a distinction was to be drawn between the suit of a son for possession, and the suit of a son to impugn a deed of alienation. In the one case, the cause of action accrues on the death of the parent; in the other from the date of the alienation. For possession, the son must wait till the death of the father, and then he may sue for possession; in which suit any alienations made without warrant of law by the father would of course be cancelled. But that is not the case where the suit is solely to impugn an act of alienation. In such a case, the cause of action is the unlawful act of

the father, and if the son does not choose to come into Court to try the right of the alienee within twelve years from the date of the alienation, or within twelve years from the date of his attaining majority, supposing the alienation to have been made during his minority, he forfeits his right to do so, and cannot during his parent's lifetime disturb the contract which he has suffered to exist unchallenged for twelve years."

From these decisions it would seem formerly to have been the received opinion, that a son seeking to set aside his father's alienations had a double remedy, either by a suit brought within twelve years from their date to have them declared void and invalid, or by a suit for possession which might be brought at any time within twelve years from the father's death.

But the recent decision of a Full Bench of the Calcutta High Court in the case of *Luchmun Pershad v. Raja Ram Tewarce*, 8 W. R. 15, is opposed to the notion of a double remedy. It was observed in this case that under the Mitakshara Law, a son by birth alone acquires a right in ancestral property, and a right during his father's lifetime to compel a partition of such property. A father cannot under that law, without the consent of the son, alienate such property except for sufficient cause, and the son has not merely a right to prohibit the father from alienating, but may sue to set aside the alienation if made. The cause of action in a case of alleged wrongful alienation by a father, must therefore be taken to accrue to the son at the time of the alienation, and not upon the death of the father, and this cause of action must be sued upon by the son within twelve years from the date of the alleged wrongful alienation, or, in the case of the son having been a minor at that date, within three years from the time when he came of age. It was also decided in this case that a new cause of action does not upon the subsequent birth of a younger brother, accrue either to the elder

brother alone, or to him and the younger brother jointly, and that a son cannot sue to set aside alienations made before his birth.* Compare *Dabee Protapnarrain Singh v. Monohur Doss*, W. R. 1864, p. 96; *Gouree Chowdhrair v. Chummun Chowdhry*, W. R. 1864, p. 340; *Seetul Pershad Singh v. Gour Dyal Singh*, 1 W. R. 283; *Beerkishore Suhaye Singh v. Hurbullub Narain Singh*, 7 W. R. 502; *Buraik Chuttur Singh v. Greedharce Singh*, 9 W. R. 337.

SECTION 1, CLAUSE 13.

To suits to enforce the right to share in any

Limitation of 12 years.

Suits for shares in joint family property and for maintenance.

property moveable or immoveable on the ground that it is joint family property; and to suits for the recovery of maintenance, where the right to receive such maintenance is a charge on the inheritance of any estate—the period of twelve years from the death of the persons from whom the property alleged to be joint is said to have descended, or on whose estate the maintenance is alleged to be a charge; or from the date of the last payment to the plaintiff or any person through whom he claims, by the

* According to the Mitakshara and Mithila law, the alienation of joint undivided property by one of several joint owners without the consent of the rest, is invalid in respect of their shares. Whether such an alienation is valid even for the alienator's own share, would seem to be doubtful. It has been held by the Madras High Court that a member of an undivided Hindoo family may, without the consent of the other members, make a valid disposition

of the share to which if a partition took place he would be individually entitled. *Virasvami Gramini v. Ayyasvami Gramini*, 1 Mad. 471; *Palominelappa Kandam v. Mannaru Naiken*, 2 Mad. 416; *Rayacharlu v. Venkatar-amaniah*, 4 Mad. 60. The tendency of the decisions of the Bengal Courts would seem to have been to a contrary effect. *Macpherson on Mortgages*, 5th ed. pp. 19-20.

person in the possession or management of such property or estate on account of such alleged share, or on account of such maintenance as the case may be.

A PRESUMPTION obtains under the Hindoo Law of the continuance of the joint right to ancestral property in the members of a joint and undivided Hindoo family. This presumption throws upon the party alleging separation at a certain time, and claiming property as separately acquired after that time, the *onus* of proving the separation and the separate acquisition. Accordingly, where it is admitted that a Hindoo family is joint and undivided, the mere fact of property standing in the name of one member of the family is not *prima facie* proof that it is his separate self-acquired property, nor is his possession *prima facie* an adverse possession as against the other members of the family. The following cases, some of which were decided before Act XIV of 1859 came into operation, will show how this presumption has been applied in questions of limitation.

Where the plaintiff sued for the share of his maternal grandfather in the family property, and the defendant pleaded limitation, and it appeared that the parties had all lived together as members of an undivided Hindoo family, the plaintiff's immediate predecessors being females, it was held that there could be no such adverse possession as would support the plea of limitation. *Rujoneekant Mitter v. Premchand Bose*, 1 Hay, 513.

In deciding an issue under the old law of limitation in a suit for a share of a joint inheritance, the lower Court found that the plaintiff had not given evidence of her possession up to the date of suit, and held her claim to be barred. On appeal it was held that such a finding was inconclusive, the real issue being whether the plaintiff was

a joint sharer, and if so, whether the joint possession continued up to any time within twelve years next before the commencement of the action. *Indurmonee Dabea v. Rajnarain Chand Mozoomdar*, Marsh. 172.

A Hindoo widow sued to recover from her husband's brother, her husband's share in a joint estate. The lower Court, assuming that she had been dispossessed from the death of her husband, which took place more than twelve years before action brought, pronounced her claim to be barred. But it was held on appeal that as it appeared that the parties had been living together as belonging to the same family, there was no presumption of an adverse holding by the defendant, or of the plaintiff's dispossession. The case was accordingly remanded for a decision on the evidence, as to whether what was joint property when the plaintiff's husband died, had since, by any act of the defendant,—either by dispossession of the widow, or by holding adversely to her without recognition of her right,—been acquired by him, and whether he had so held for more than twelve years. *Kistomonee Chowdhry v. Shibchunder Chowdhry*, 1 Hay, 473. The mere fact of a Hindoo widow, entitled to her husband's share in a joint estate, continuing to live with the joint family, and to mess with them, has been held sufficient, in the absence of evidence to the contrary, to show that she is in joint possession, and that she has been receiving payments in money or in money's worth on account of her share. *Bindoo Bashinee Dossee v. Anund Chunder Paul*, 2 W. R. 179. *Kripa Moyee Dabea v. Gobind Chunder Bagchee*, 11 W. R. 338.

The widow of one Ram Gobind, on behalf of herself and minor sons, sued certain members of her deceased husband's family for a share of joint ancestral property from which she alleged that she had been ousted. It appeared that the father of Ram Gobind, through whom the plaintiff alleged her right to be derived, when sued during his lifetime as trustee for the defendant's father,

then a minor, for misappropriation of the funds of the estate in dispute, did not plead that he was a joint sharer and not a trustee. The Court held that although there is a legal presumption that a Hindoo family admittedly once joint, continues joint, and the burthen of proof rests with those who aver a separation of rights, still in this case the presumption had been *prima facie* rebutted so as to shift back upon the plaintiff the burthen of proving that she had possession and was dispossessed within twelve years previous to suit. *Surnomoyee Dabea v. Gunga Gobind Roy*, 2 W. R. 264. Compare *Drobomoyee Burmonea v. Bhuggobbutty Dabea*, 2 Hay, 470.

The interpretation and construction of this Clause were very fully discussed in the judgments pronounced by HOLLOWAY and COLLETT, JJ., in the case of *Govindan Pillai v. Chidambara Pillai*, 3 Mad. 99, of which the following is an abstract.

The words of this Clause which prescribe a period of twelve years from the death of the person from whom the property alleged to be joint is said to have descended, as the time within which a suit to enforce the right to share in such property must be brought, have special reference to the law of inheritance prevailing in Bengal, where the theory is that property descends from father to son, and where the right to enforce partition, only arises on the death of the father. There is great difficulty, however, in applying this provision to the law of inheritance as it exists in the Madras Presidency, where nothing except self-acquired property can properly be said to descend, and where, in respect of all other property, a son from the moment of his birth is a coparcener with, and can enforce partition against his father. Even in its application to the Bengal law of inheritance, the Clause must be understood to relate to the case of a claimant who has been entirely out of possession, and excluded from possession by those against whom he claims; since it would be un-

reasonable to hold that where, on the death of the father, the family elects to remain in union, and all the members are supported in the family house under the presidency of the elder brother, the right of one of the family to enforce partition must be exercised within twelve years or not at all, his right to a partition becoming barred while he remains in actual possession or enjoyment of the property, unless he is able to show that some payment has been made to him. So also, where an absent member of a joint family contributes to the maintenance and improvement of the joint property, it would be unreasonable to hold that his right to a share would be barred, should he have failed within twelve years to enforce a payment to himself which might keep alive his remedy. The absence of possession in one person, and the exclusive possession by another must unite for the statutory period. As the Act does not in its provisions relating to real property, abolish the old doctrine of hostile and friendly possession, or the doctrine that the possession of one joint-tenant, co-parcener, or tenant-in-common is the possession of all, the only effect which can be given to it, is to make it a question on the facts whether the possession is hostile, whereas it was formerly an irrebuttable presumption of law that the possession was friendly. Compare *Subhaiyan v. Sankara Subhaiyar*, 2 Mad. 347, in which similar views were expressed.

A plaintiff sued to establish his title to, and obtain possession of a share in certain lands, belonging as he alleged to the joint undivided family estate. The defendants pleaded limitation, contending that the family was divided, and that the lands claimed belonged exclusively to them. It was held by the Agra High Court that as it appeared that both parties were descended from a common ancestor, to whom the lands in dispute had belonged, and that the separation between the parties had taken place within the statutory limit of twelve years, up to which time they had

lived together as an undivided family, it lay upon the defendants who alleged an exclusive right, to show their exclusive title, or a distinct severalty of interest and a clearly adverse possession for more than twelve years *Bainee Singh v. Bhurth Singh*, 1 Agra, 162.

In order to bar a suit by a co-sharer in a joint estate, or a person claiming under a purchase from such co-sharer, it must be distinctly shewn by the defendant co-sharers that there has been hostile possession for the period required by the law, and that the plaintiff or the person under whom he claims, being a person not disqualified from suing, has slept over his rights so as to have lost his remedy. *Johirooddeen v. Nasirooddeen Mahomed Chowdhry*, 3 Wym. 265. Compare *Lalla Beharee Lall v. Lalla Modhoo Pershad*, 6 W. R. 69; *Bukhoree Lall v. Pearee Lall*, 12 W. R. 124.

Where one of several co-sharers manages the joint estate and is accountable to the others, the mere non-receipt by one of the co-sharers for a period of twelve years of his share in the profits of the estate, will not bar a suit by such co-sharer to have his right to a share in the profits of the estate declared. *Shibo Soonduree Dossee v. Kalichurn Roy*, W. R. 1864, p. 296. *Brojobullub Seal v. Luckheemonee Dossee*, 11 W. R. 132.

A co-sharer suing to establish his right to a share in the joint estate can only be barred by limitation under this Clause, where those who are his co-sharers and dispute his claim, can show that they have dealt with the property for twelve years as exclusively their own, and so as utterly to destroy the presumption that they were acting on behalf of the plaintiff. An adverse possession distinctly indicating separate proprietorship must be pleaded and proved by the co-sharers; and if they do not plead it, a mere lessee under them cannot take the objection. *Ranee Shama Soonduree v. Jardine Skinner & Co.*, 3 W. R. 144. But compare *Bama Soonduree v. Junglee Shikdar*, 1 W. R. 202.

In several cases, however, an opinion has been expressed that the *prima facie* presumption in respect to the property of a joint undivided Hindoo family remaining joint, will not govern the decision of questions of limitation arising under this Clause. Thus, in the case of *Punchanun Dyal v. Madhub Dyal*, W. R. 1864, p. 349, in which the plaintiff claimed a share in certain family property, it being alleged by the defendants that there had been a separation of the joint family more than twelve years before action brought, and a sole possession by them from that time, the High Court held that particular enquiry ought to have been made by the lower Court into the evidence as to the mode in which the property had been enjoyed with a view to ascertain whether the plaintiff had within twelve years before the institution of his suit received anything on account of his share of the property, or had otherwise been in joint possession; since if it appeared that the plaintiff had for twelve years and upwards been excluded from all interest in the property, the limitation provided by the Clause under notice would apply. See also the cases of *Ombika Churn Sett v. Bhagobutty Churn Sett*, 3 W. R. 173; *Gopal Mal v. Bydonath Ojha*, 6 W. R. 170; *Hurrehur Mookerjee v. Teenkoicree Dossee*, 6 W. R. 170; *Uma Sundari Dasi v. Dwarkanath Roy*, 2 Ben. A. C. 284; and compare *Onooda Churn Bannerjee v. Biresur Bannerjee*, 3 W. R. 12.

In the case of *Nobin Kishore Bannerjee v. Hurrehur Mookerjee*, 5 W. R. 251, the Court observed:—"We are by no means prepared to say that as mere presumption of law, we must not assume the estate to be joint, till it is proved to be separate. But, be that as it may, it is evident, that the law limiting such claims to twelve years, any honest party must be in position to show whether he has had any enjoyment of the estate, either jointly, or by division of the profits within that time."

A Hindoo widow sued for confirmation of her right in

certain lands which she alleged had been possessed by her husband jointly with his brother as ancestral property. The defendant, who it appeared had got a decree for possession of the lands in question in a summary suit under Section 15 of this Act, pleaded that the plaintiff had never been in possession. It was held by the High Court that the lower Court was wrong in giving judgment in favour of the plaintiff on a finding that the property had at one time been joint, and that it was not shewn when a separation had taken place, since, under this, and the preceding Clause, it was for the plaintiff to get over the bar of limitation raised by the defendant's plea, and to show that she had been in possession within twelve years. *Suttobhama Gooptah v. Shantomonee Gooptah*, 7 W. R. 34; *Brokobhanoo Dossee v. Huro Soonduree Dossee*, 10 W. R. 264.

A daughter sued for possession of a joint share in certain lands by right of inheritance from her deceased father, alleging that she had been in joint possession thereof from the date of his death up to a time within twelve years from the institution of her suit, when she was dispossessed by the defendants, her co-sharers. The defendants denied that the plaintiff had ever been in possession of the land claimed, which they alleged that they held under a will. The Court of first instance dismissed the claim as barred by limitation, by reason that the plaintiff had never been in possession since her father's death. The lower appellate Court held that until the defendants proved the will under which they claimed to hold, no question of limitation adverse to the plaintiff could be entertained. The case coming before the High Court on special appeal, it was held that the judgment of the lower appellate Court was erroneous, since the point whether the plaintiff had ever had joint possession of the property, having been tried and decided against her by the Court of first instance, the appellate Court, before going farther, should

have tried the same issue, and have determined it with reference to the provisions of the Clause under notice. The Court at the same time observed that, as there was no allegation in the pleadings that the family was separate, or that the property in dispute was not ancestral, if the plaintiff had been able to prove her possession either personal or constructive at any time within twelve years before the institution of her suit, the question whether the will was or was not genuine could not have arisen. *Rajkoomaree Dabea v. Gopal Chunder Chatterjee*, 4 W. R. 101.

In the case of *Kundurp Narain Singh v. Bundoo Ram Sein*, 3 W. R. x. 6, the plaintiff had originally sued in the Collector's Court for arrears of rent due in respect of certain lands occupied by the defendants; but on the latter pleading that they held the lands for which rent was claimed under a partition, the plaintiff's claim was dismissed. The plaintiff then sued in the Civil Court to have his right and title to the lands declared, admitting the defendants to be co-sharers with him in the general estate, but alleging that with respect to the particular lands in dispute, the defendants were only in the position of ordinary tenants, and as such were liable for rent. The claim brought in this shape was held by the lower Courts to be barred by limitation under Section 77 of Act X of 1859, as not brought within one year from the date of the Collector's decision; but on special appeal it was held by the High Court that that Section is not applicable to a case in which there has been no intervention.* Further, it was ruled that the suit was not barred under Clause 5, Section, 1, Act XIV of 1859, since it was not brought to set aside the Collector's decision, but was an original suit to obtain a declaration of title by setting aside the defendant's plea of partition. The Court held that if the plaintiff could prove his possession within twelve years, his suit might be maintained.

* See *supra*, pp. 178-179.

Lall Beharee died leaving two widows, of whom Phool-essuree was the elder, and Judoobunsee the younger. On his death, Phool-essuree was allowed to take possession of his entire estate. On the death of Phool-essuree, Judoobunsee sued for a declaration of her right to, and for possession of the estate. The lower appellate Court decided that as by the Mitakshara law, by which the parties were governed, the widows had equal rights to the succession on the death of their husband, the plaintiff's cause of action must be taken to have arisen from Lall Beharee's death, and that her claim was barred as not brought within twelve years from that date. It was ruled by the High Court that assuming the rights of the widows on the death of the husband to be equal, the younger widow would on the death of the elder, be, at all events, entitled as heir to a moiety of the estate which the latter had held. But as it appeared that the plaintiff had during the lifetime of the elder widow, received an allowance out of the profits of the estate, the entire possession of the latter was pronounced not to be adverse to her. *Judoobunsee Koor v. Girbhurun Koor*, 12 W. R. 158.

It has been held that the provisions of this Clause apply to property held as joint-property by Mahomedan as well as by Hindoo families. *Salehoonissa Khatoon v. Khyroonissa*, 5 W. R. 238; *Ajeejoonissa Beebee v. Achina Beebee*, 11 W. R. 45. In this last case it was said that the word 'payment' as used in this Clause, is not necessarily to be understood as meaning a money payment, but that it is open to the Court trying the claim to draw its own conclusions and inferences from the facts before it, as to what constitutes a payment.

This Clause has been held to apply to all suits for the recovery of maintenance, where the right to receive such maintenance is a charge on the inheritance, whether such right has arisen out of the general law, or out of a specific deed granting it. *Shama Soonduree v. Bama Soonduree*,

W. R. 1864, p. 13. The right to maintenance is a constantly recurring right, and the only bar to its enforcement is the lapse of the time required by the law of limitation to bar the remedy. *Venkopadhyaya v. Kavari Hengusu*, 2 Mad. 36. Where a Hindoo widow has been maintained out of her husband's estate, from the time of her husband's death, up to within twelve years from the institution of a suit brought by her for a declaration of her right to maintenance, the limitation provided by this Clause cannot be applied. *Luckheemonee Dabea v. Ahollya Bhai Dabea*, 6 W. R. 37.

A Hindoo widow sued the brothers of her deceased husband for maintenance. The defendants pleaded limitation under this Clause. It appeared that the plaintiff's husband had died during the lifetime of his father, without having inherited, more than twelve years before the institution of the plaintiff's suit. It was held by the High Court that the mere fact of more than twelve years having elapsed between the death of the plaintiff's husband and the institution of her suit, did not bar her remedy, inasmuch as her husband having pre-deceased his father, her maintenance, although a charge on the property in the father's hands, was not so long as the father lived, 'a charge on the inheritance of any estate.' The Court, KEMP and SETON KARR, J.J., was of opinion that when the father's property went on his death to his heirs, the plaintiff's maintenance became for the first time a charge on the inheritance, and that the plaintiff's suit being brought within twelve years from that date was maintainable. *Luckheemonee Dabea v. Binode Lal Chatterjee*, 4 W. R. 84. The language in which this decision is expressed, is not very clear, and the view taken by the Court seems open to question. In the case of *Khetramani Dasi v. Kashinath Das*, 2 Ben. A. C. 15, it was said by PEACOCK, C. J., whose opinion was followed by a majority of a Full Bench, that "according to the law as administered in lower Bengal, a daughter-

in-law has no legal ground of action to recover maintenance against her father-in-law. The rights of a wife, or of a widow, and those of a son's widow, to maintenance are governed by very different principles. A son's widow has not the same legal right against her father-in-law as a wife has against her husband, or as a widow has against the heirs of her husband who take his estate by inheritance. The father is not heir to his son in preference to the son's widow. A son's widow has no right in her father-in-law's estate, and upon partition of such estate, she is not, like a daughter, entitled to a share even though the estate is ancestral." Applying these remarks to the case of *Luckheemonee Dabea*, it would seem that neither during her husband's lifetime, nor on his death, could she have any claim as against her father-in-law or his estate, for maintenance, and consequently none as against his heirs.

But in the case of *Chandrabhagabai v. Kashinath*, 2 Bom. 323, the Bombay High Court appears to have considered that a widow may maintain a claim for maintenance against her husband's father; and in the case of *Timappa Bhat v. Parmeshriamma*, 5 Bom. A. C. 130, it was held by the same Court that a widow is entitled to maintenance from her husband's brother, whether separated or not, notwithstanding the non-receipt by the latter of her husband's assets. It was observed in this case that the Clause under notice does not apply to all suits for the recovery of maintenance brought by a Hindoo widow against her husband's family, but only to suits in which she seeks to have her maintenance made a charge on a particular estate; that there is nothing in the Hindoo law to prevent a Court from awarding a widow a separate maintenance; and that in a suit for maintenance the cause of action ordinarily arises at the time when the maintenance, having become necessary, is refused by the party from whom it is claimed. Compare *Bai Lakshmi v. Lakhmidas Gopaldas*, 1 Bom. 13.

A suit to establish a right to a share in a *watan* and to recover a portion of the profits thereof, is governed by the limitation provided by this Clause, and not by Clause 16 of this Section. *Gundo Anandrao v. Krishnarao Govind*, 4 Bom. A. C. 55. It has also been held that where a plaintiff sues to establish his right to a share in a *watan*, a written acknowledgment of his right signed by the defendant, will not have the effect of renewing the period of limitation provided by this Clause so as to give a new starting-point, since the terms of the Clause require that there should be a payment to the plaintiff on account of his alleged share, by the person in possession or having the management of the *watan*, and do not provide for a written acknowledgment; while the terms of Section 4 of the Act, which give a renewed period of limitation in cases of a written and signed acknowledgment, refer only to debts and legacies. *Amritra bin Yeshwantrao Deshmukh v. Angaba bin Abaji Deshmukh*, 5 Bom., A. C. 51; compare *Sinde v. Sinde*, 4 Bom. A. C. 51. It would appear from the latter of these two cases that as under Section 4, Act XI of 1843, the right to the enjoyment of a share in a *watan* may be a periodically recurring right,—since the duties of the office may be performed in rotation by different sharers,—where the turn of one of the sharers to enjoy the *watan* has accrued within twelve years, he will not be barred by limitation from enforcing his claim, although he has received no payment on account of his share in the *watan* within twelve years. Compare *Toolsee Ram v. Nahur Singh*, 3 Agra, 271.

A co-owner of certain village lands in the Madras Presidency sued in 1861 to have them divided among the villagers, according to a custom that at the expiration of every twelve years the lands should be re-distributed by lot among the co-owners,—and to have two of the shares allotted to him as one of such co-owners. It was pleaded that as there had been no instance of the custom having been observed since the year 1835, the law of limitation raised a

bar to its exercise. But as it appeared that in 1851, another co-owner had, in a suit to which some of the defendants in the plaintiff's suit were parties, obtained a decree for the periodical allotment of the lands, and that that decree, which clearly recognized the existence and validity of the custom, had in 1853 been affirmed on appeal, it was held that without pronouncing whether in the absence of the former litigation the law of limitation would have been a bar, that litigation was sufficient to prevent limitation from operating, and that the circumstance that some only of the defendants were parties to the former litigation could make no difference in respect to the plea of limitation. *Venkatasvami Nayakkan v. Subba Rau*. 2 Mad. 1. This case was decided under the old law of limitation. It may be doubted whether under Act XIV of 1859 any effect could have been given to the previous litigation as keeping alive the plaintiff's right to sue.

SECTION 1. CLAUSE 14.

<p>Limitation of 12 years. Suits by proprietor of land to resume or assess Lakheraj or rent-free land.</p>	<p>To suits by the proprietor of any land or by any person claiming under him, for the resumption or assessment of any Lakheraj or rent-free land—the period of twelve years from the time when the title of the person claiming the right to resume and assess such lands, or of some person under whom he claims, first accrued. Provided that in estates permanently settled no such suit, although brought within twelve years from the time when the title of such person first accrued, shall be maintained if it is shown that the land</p>
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has been held Lakheraj or rent-free from the period of the permanent settlement.

THE words 'rent-free' used in this Clause, are not used in contradistinction to 'lakheraj,' but merely as showing the meaning, or giving the English equivalent of the term. *Nobin Chunder Roy Chowdhry v. Janokee Bullub Chuckerbutty*, 2 W. R. x. 33.

The original Regulations for the decennial settlement of the public revenues of Bengal, Behar, and Orissa, were passed for these provinces respectively on the 18th September 1789, the 25th November 1789, and the 10th February 1790. The revenue assessed upon the lands of these provinces under the above Regulations was declared fixed for ever by Regulation I of 1793, passed by the Governor General in Council on the 1st May, with effect from the 22nd March of that year.

Before Act XIV of 1859 came into operation, the material question arising on a plea of limitation in a suit to resume or assess lakheraj land, was whether the tenure was in existence as lakheraj prior to the year 1790. The importance of this issue had reference to the provision of Section 10, Regulation XIX of 1793, by which a suit for the assessment or resumption of lands claimed by a plaintiff as part of his *mdl* lands, was exempted from limitation, if the alleged rent-free tenure was shewn to have been created later than the 1st December 1790. It was, however, decided by the Privy Council in the case of *Chundrabullee Dabea v. Luckhee Dabea Chowdhraim*, 5 W. R. p. c. 1, that this provision must be taken to have been modified and controlled by the sixty years rule of limitation enacted in Clause 3, Section 3, Regulation II of 1805; and that under that Clause a zemindar's right to assess or resume lakheraj lands was barred by the defendant's peaceable and undisturbed possession for sixty

years, even where such possession had been held under a grant of later date than the 1st December 1790.

In all suits to assess or resume lakheraj lands instituted on or after the 1st January 1862, from which date Act XIV of 1859 came into force, the *nullum tempus* provision of Section 10, Regulation XIX of 1793 can have no operation. *Poorno Chunder Roy v. Khelat Chunder Ghose*, 2 W. R. 258. All such suits will be governed by the provisions of this Clause, and will be barred unless commenced within twelve years from the time when the plaintiff's title accrued. *Dhunput Singh v. Bhoojah Sahoo*, 4 W. R. 53. Where the time for bringing such a suit, has run out in the lifetime of a father, the right to sue is lost to the son. *Amatoollah v. Nubbee Buksh*, W. R. 1864, x. p. 132. And where the right to sue has not been exercised within the allowed time by a zemindar, it cannot be revived in a putneedar or dur-putneedar deriving title from the zemindar. *Shib Pershad Chowdhry v. Shaikh Busseerooddeen*, W. R. 1864, p. 170; *Joykissen Mookerjee v. Kristomohun Doss Bukshee*, 3 W. R. 33.

It is to be observed that by the terms of this Clause, limitation is to be reckoned from the time when the title of the plaintiff, or of the person under whom he claims, first accrued. *Seta Rama Kristna Rayudappa Ranga Rao v. Jagunti Sitayamma Garu*, 3 Mad. 67. But where suits are brought for the rents, or to recover possession of lands in respect of which a lakheraj holding is alleged by the defendant, the Court has in various cases held that enquiry should be made (not as to the time when the plaintiff's title accrued, but) as to the time when his *cause of action* accrued, and have called upon him to show that he has, within twelve years prior to suit, been in possession of, or collected rent from the lands as *mâl*. In such a suit, the plaintiff's cause of action will be deemed to have accrued from the time when the

defendant began to hold the lands rent-free; i. e., on a tenure adverse to the plaintiff's allegation of a *mâl* tenure. *Gobind Chunder Shaha v. Kishen Chunder Shaha*, 6 W. R. 110; *Furlong v. Khusroo Mundur*, 7 W. R. 531.

Where a plaintiff claims rent on account of lands as *mâl* from a defendant who alleges a lakheraj tenure, no deduction can be made, under Section 14 of this Act, from the period of limitation, on account of suits which the plaintiff has fruitlessly brought against the same defendant for rent, or for small portions of the same lands. *Prodhan Gopal Singh v. Bhoop Roy Ojha*, 9 W. R. 570. Nor can the time be deducted during which a former suit for assessment, not brought by the plaintiff, nor by any one through whom he claims, was pending. *Borodakant Roy v. Sookhmoy Mookerjee*, 1 W. R. 29.

Under the old law, claims for the resumption or assessment of lakheraj land were barred by the twelve years rule of limitation, when it appeared that the lakheraj holding was of older date than the 1st December, 1790. *Prankissen Roy Chowdhry v. Debনারain Bose*, 1 Hay, 26. But an exception was made in favor of the purchaser of an estate sold for arrears of Government Revenue, to whom it was open, at any time within twelve years from the date of his purchase, to sue for the assessment or resumption of all lands belonging to the estate, although held under a rent-free tenure from a date prior to 1790. *Syud Mahomed Hossein v. Okhoy Ram Jannah*, W. R. 1864, p. 212; *Soobhoge Dabea v. Kali Pershad Halidar*, 1 W. R. 218. This exception in favour of an auction purchaser is restricted by the provisions of the Clause under notice. In a suit to assess or resume brought after Act XIV of 1859 came into force, a defendant who can prove that he, or those through whom he claims have held the lands, whether established to be veritable lakheraj or not, from before the date of the permanent settlement, is absolutely protected even from an auction purchaser. *Bhug-*

wan Chunder Bose v. Radhakristo Mytee, 1 W. R. 248; *Joykissen Mookerjee v. Kristomohun Doss Bukshee*, 3 W. R. 33; *Romanath Rokhit v. Sristeedhur Sawunt*, 6 W. R. 58. In such a suit the *onus* will be on the defendant to show a rent-free possession from the permanent settlement. It will not, however, be necessary that he should give direct proof of his holding up to the exact date of the permanent settlement. It will be sufficient that he should furnish such evidence as satisfies the Court that the holding is really of ancient date, as old as the settlement, and not a mere modern appropriation. *Heera Monee Dabea v. Lokenath Mundul*, 2 W. R. 135; *Forbes v. Shaikh Mean Jan*, 3 W. R. 69; *Sham Lall Ghose v. Sekunder Khan*, 3 W. R. 182; *Moharanee Odhiranee Narainee Koonwarcce v. Nobolall Khan*, 5 W. R. 191; compare also *Romesh Chunder Dutt v. Gooroo Doss Nundee*, W. R. 1864, p. 204. Where the defendant is unable to show that his rent-free holding dates from the permanent settlement, the right of a plaintiff who is an auction-purchaser at a sale for arrears of Government Revenue, suing within twelve years from the date of his purchase to assess or resume, will not be barred.

While the old law of limitation was in force, the *onus* in a suit brought under Section 10, Regulation XIX of 1793 to assess or resume rent-free lands, lay with the plaintiff zemindar, to prove that his claim was one falling within that Section, so as to show that by the terms of that Section it was exempted from the ordinary rule of limitation. Where a plaintiff could show that the lands held by the defendant as lakheraj, were a part of his, the plaintiff's, *mál* lands, and that they had been assessed as such to the public revenue at the time of the permanent settlement, it was presumed until the contrary was established that the right under which the defendant claimed as lakherajdar, commenced subsequently to the 1st December, 1790. *Moulvie Abdool Furar v. Sonatun Ghose*, 2 W. R.

205. By the latter part of Section 10, Regulation XIX of 1793, the proprietors of permanently settled estates were "authorized and required" without application to the Government or to any Court of Judicature, to dispossess all persons holding lands belonging to such estates under rent-free grants of a date subsequent to the 1st December, 1790. Where a lakherajdar who had been ousted from lands by a zemindar, sued to recover possession, the *onus* of proof was not altered: it was still for the defendant, zemindar, to establish that the lakheraj had been created after 1790, so as to show that the ouster was authorized by the provisions of the Regulation, and not for the plaintiff, who had been in the possession of the lands as lakheraj to prove that his rent-free holding had been created before that date. *Monmohinee Dossee v. Joykishen Mookerjee*, W. R. sp. p. 174.*

The right to dispossess without the intervention of the Courts, conferred by the Section above cited, and by other enactments to the like effect, was repealed by Section 28, Act X of 1859, by which it was directed that proprietors and farmers of settled estates desiring to dispossess grantees of lands held under rent-free grants of a date subsequent to the permanent settlement, or to assess such lands, should make application to the Collector within twelve years from the date on which their title first accrued, or if that period had already expired, or would expire within two years from the passing of the Act, then within two years from that date. In a suit under Section 28, Act X of 1859, to dispossess a defendant from lands which he is holding rent-free, the

* Compare *Deenonath Paul v. Ram Lockun Sirkar*, 2 W. R. 279; *Mohunt Prem Shewuck Doss v. Issuree Pershad*, 2 W. R. 303; *Ottum Churn Dutt v. Ram Lall Dan*, 5 W. R. 91; *Munsaram Doss Kormokar v. Gridharee Ram Doss*, 10 W. R. 278. The rule laid down in the case of *Monmohinee Dossee* was apparently departed from in the case of *Nobokissen Mookerjee v. Pro-mothonath Ghose*, 5 W. R. 148; but see the remarks on that case in *Kalidoss Chunder v. Beharoo Loll Roy*, 8 W. R. 451.

plaint ought distinctly to declare that the defendant holds under a grant of a date subsequent to the permanent settlement, and that the plaintiff's title first accrued within the period prescribed by the Section. *Reazoonnissa Beebee v. Motee Singh*, 12 W. R. 135. It was held in this case that where A, a zemindar, had forcibly dispossessed B, a lakherajdar, and B had sued and recovered possession from A; and A then sued under Section 28 of Act X to eject B, the time during which A had been in forcible possession of the disputed land would in no way affect the operation of limitation against his claim, since his cause of action remained the same as it was before he took the law into his own hands, and he could reap no benefit from his own illegal acts.

The jurisdiction conferred by Section 28, Act X of 1859, upon the Collectors' Courts, was held by a Full Bench not to exclude the jurisdiction of the Civil Courts, under Clause 14, Section 1, Act XIV of 1859, to try claims for the assessment or resumption of lands said to be held rent-free under grants of a date subsequent to the permanent settlement. *Moulvie Abdool Furar v. Sonatun Ghose*, 2 W. R. 91, 205. It was also held by a majority of the Court in this case that the provisions of Section 30, Regulation II of 1819, conferring a jurisdiction on Collectors in certain suits respecting the assessment and resumption of lakheraj lands, had reference solely to suits in respect of lands which were claimed to be held rent-free under grants made before the date of the permanent settlement.* The Section last referred to was repealed by the Bengal Council Act VII of 1862, which provides that the class of suits to which it relates shall be tried by

* Compare *Heeramones Dabea v. Koonj Beharee Haldar*, 2 W. R. 207; *Poorno Chunder Roy v. Khelat Chunder Ghose*, 2 W. R. 258; *Beebee Oomutbatool v. Rajah Roy*, 2 W. R. x. 102; *Sookhoda Dabea v. Shaikh Azeemooddeen*, 2 W. R. 302; *Moharanes Odhiranes Naraines Koonwarees v. Nobolall Khan*, 3 W. R. 5.

the Civil Courts under the Civil Procedure Code. But by the terms of the Clause under notice, it is clear that no suit to assess or resume lakheraj can be maintained where the lakheraj grant dates from the permanent settlement.

The limitation provided by the Clause under notice for suits in the Civil Courts for the assessment or resumption of lands where the rent-free holding was created after the date of the permanent settlement, is practically identical with that laid down in Section 28, Act X of 1859, for suits of a similar nature brought in a Collector's Court. *Dhunput Singh v. Bhoojah Sahoo*, 4 W. R. 53. And since the jurisdiction of the Civil Courts and the Courts of Collectors in the trial of such suits is concurrent, parties cannot be allowed after suing unsuccessfully in the latter Courts, to try the same question over again in the former. *Beebee Oomutbatool v. Rajah Roy*, 2 W. R. x. 102.* But a former suit for possession of lands, or for a declaration of right therein, has been held to be no bar to a subsequent suit for the resumption of the same lands as invalid lakheraj. *Saroda Soonduree Dabea v. Issur Chunder Shaha*, 3 W. R. x. 18.

A, as zemindar, sued certain ryots for enhanced rent. B alleging that the land occupied by the ryots was not the zemindar's *mál*, but was his, B's, lakheraj, intervened under Section 77, Act X of 1859, but unsuccessfully. B then brought a regular suit in the Civil Court to establish his title. As it appeared that B had been in adverse possession of the land in dispute for more than twelve years, the Court declined to enter into the question of the validity of his lakheraj tenure, and gave a judgment in his

* This concurrent jurisdiction is, however, taken away by Section 33, Act VIII of 1869, of the Bengal Council, which provides that from the time when that Act shall come into force, the jurisdiction

of the Collectorate Courts to entertain suits under Act X of 1859 shall cease; and that all such suits shall be cognizable by the Civil Courts.

favour. On special appeal it was contended that the lower Court was in error in deciding simply on the ground of possession, since that point had already been determined against the plaintiff by the Collector in the rent suit. The High Court was, however, of opinion that the Collector's decision as to possession was conclusive only for the purposes of the particular case before him, and could not affect the decision of the regular suit: and that as in that suit the Court had found that B had been for twelve years in possession, and as such possession in itself conferred a title, B was not bound to establish affirmatively the validity of his lakheraj title. *Brojo Mohun Chuckerbutty v. Bissonath Komilla*, 10 W. R. 61. But compare the earlier decision in *Ramjeebun Chuckerbutty v. Pershad Shar*, 7 W. R. 458, in which as it appeared that a plaintiff suing to establish his title to lands as lakheraj, had previously, under Section 77, Act X of 1852, intervened unsuccessfully in a suit in which the defendant had as zemindar sued certain tenants of the disputed lands for enhanced rent, it was held that he was bound to prove his lakheraj title, and that no proof of possession for years, unless carried beyond 1790, of the lands as apparent lakheraj could relieve him from that *onus*.

A sued B for the recovery of certain lands, alleging that they had been formerly held by him as lakheraj, and had afterwards been resumed by the Government and settled with him, but that B had dispossessed him. B on the other hand claimed to hold the lands under an independant title to establish which he also had instituted a suit. The lower Court considering only the question whether the lands in dispute were or were not included in the lakheraj estate settled with A, and finding that they were, gave judgment in favour of A. But it was held on appeal that if B's possession extended over a period of more than twelve years prior to suit, he was entitled, notwithstanding the decree of the Resumption

Court, to the benefit of limitation. *Bhoneshun v. Runglall Sahoo*, 1 W. R. 109; compare *Jugut Chunder Roy v. Alyat Chinaman*, cited *ante*, p. 151.

The right of the Government to sue for the assessment of lands as appertaining to the Government *khās mehals*, and for a declaration over-ruling a defendant's plea of rent-free tenure, was discussed at much length in the case of *The Collector of the 24-Pergunnahs v. Gunga Gobind Mundul*, 2 Hay 33, and by the Privy Council, on appeal. 7 W. R. p. c. 21. Their Lordships of the Privy Council decided that the right and title of Government, where the ownership is established to be in another, is only to the rent of the lands, and rather resembles a seigniority than the right of a lessor with a reversion. It was observed that if the lands in dispute were rent paying lands, the title of the Government was simply to the rent, the nature of which was that of a *jumma* or tribute; and that if the holders of the lands asserted a groundless claim to hold them free of rent as *lakheraj*, that claim would not destroy their proprietary right in the lands themselves, but simply subject the owners to liability to be sued in a resumption suit, the object of which is, not to obtain a forfeiture of the lands, but to have a decree against the alleged rent-free tenure involving the measurement and assessment of the lands, and the liability of the person in possession, if he wishes to retain possession, to pay the revenue so assessed. As it is provided by Section 17 of this Act that suits for the recovery of public claims shall be governed by the old rules of limitation, a suit of the above nature might be maintained at any time within sixty years from the date when the cause of action accrued.

The following may be given as an abstract of the rules of limitation applicable to suits for the assessment or resumption of *lakheraj* lands, under the old laws, and under Act XIV of 1859, respectively.

Under the old laws:—In the case of *lakheraj* created prior

to the date of the decennial settlement, the claim of a zemindar was barred where twelve years had elapsed between the time when his title, or the title of the person through whom he claimed, had accrued, and the date of suit. But as the title of a purchaser at a sale for arrears of Government Revenue accrues only from the date of his purchase, a suit brought by such a purchaser within twelve years from the date of his purchase was always in time. In the case of lakheraj created subsequent to the decennial settlement no limitation was formerly held to run against the claim of the zemindar. But in accordance with the decision of the Privy Council in the case of *Chundrabullee Dabee*, the claim of the zemindar, and perhaps even of an auction purchaser, might, under Clause 3, Section 3, Regulation II of 1805, become barred by the adverse and peaceable possession of the lakherajdar for sixty years. Where a zemindar sued to assess or resume lakheraj lands, alleging that the lakheraj was created subsequent to the date of the decennial settlement, the *onus* was on him to show that the lakheraj was created after that date, and the rule as to the *onus* of proof was not altered when the lakherajdar having been summarily ejected by the zemindar under the powers conferred on the latter by Section 10, Regulation XIX of 1793, sued for recovery of possession or to have his lakheraj right declared.

Under Act XIV of 1859 :—No suit to assess or resume lakheraj land can now be maintained, where it is shewn that the land has been held lakheraj from the date of the permanent settlement. The case of the purchaser at a sale for arrears of Government Revenue, is no exception to this rule. Where the defendant pleads a holding from the date of the permanent settlement, the *onus* will be on him to prove it. But the proof may be inferential and need not be direct. In respect of lakheraj created subsequently to the date of the permanent settlement, the right of the plaintiff to sue for resumption or assessment will be

barred unless the suit be brought within twelve years from the time when the title of the plaintiff or that of the person through whom he claims has accrued. To launch his case the plaintiff must *first* establish that his title accrued within twelve years before suit. In the case of an auction purchaser suing within twelve years from the date of his purchase, he will be entitled to a decree on proving his *mal* right. But if the defendant can establish a lakheraj holding from the permanent settlement, the plaintiff's suit will be rejected.

SECTION 1, CLAUSE 15.

To suits against a depositary, pawnee, or mortgagee of any property moveable or immoveable for the recovery of the same—a period of thirty years if the property be moveable and sixty years if it be immoveable, from the time of the deposit, pawn, or mortgage; or if in the meantime an acknowledgment of the title of the depositor, pawner, or mortgagor, or of his right of redemption, shall have been given in writing signed by the depositary, pawnee, or mortgagee, or some person claiming under him, from the date of such acknowledgment in writing.

UNDER the provisions of Clause 4, Section 3, Regulation II of 1805, no length of time operated as a bar to the institution of such suits as are provided for under this Clause.

With respect to the words "depository, pawnee, or mortgagee" used in this Clause, the Indian Law Commissioners, in the 37th paragraph of their report, dated the 25th March 1843, upon the Draft Limitation Act at that time under the consideration of the Legislature, observe:—"By 'depositories' we mean persons holding possession of moveable property originally delivered to them to be kept for the owner, or in pledge as security for a debt, in contradistinction from 'mortgagees' or persons holding immoveable property in pledge. Seeing, however, that the term 'depository, may be construed in a more limited sense than we intended, we propose to add the word 'pawnee,' to meet expressly the case of moveable property pledged for a debt."

A, the owner of a house, allowed B to occupy it without paying rent, on the understanding that B should keep it in repair and restore it on demand. Nine years afterwards, and without any demand having been made by A, B died, and his heirs continued to occupy the house apparently on the same terms as B had occupied. Sixteen years after the death of B, a suit was brought against his heirs by A, for possession of the house. It was held by the Bombay High Court that B could not be considered to have been a *depository* within the meaning of this Clause. It was observed by COUCH, C.J., that the term depository in its strictest sense might apply both to moveable and immoveable property, since there might be a deposit of the one as well as of the other; but that in England the term 'depository' in its legal sense, applied to personal or moveable property only, and not to immoveable, and that as Act XIV of 1859 was intended to apply to cases tried in the Supreme Courts which were governed by English law, it must be construed with reference to the law of England. *Radhabai v. Shama*, 4 Bom. A. C. 155. It was held in this case, that if there had been an adverse occupation on the part of B, or his heirs, the limitation

provided under Clause 12 of this Section might have applied; but that as B had occupied as tenant at will of A, and as such tenancy was not on the death of B, as of course, converted into an adverse occupation by the heirs of B, in the absence of proof of the intention of the parties to that effect, and in the absence of anything to show that A did not assent to the heirs of B continuing to hold on the same terms as B had done, there was no such adverse possession as would raise the bar of limitation. Compare the cases of *Nund Coomar Bannerjee* and *Rewat Lall Singh*, cited *ante*, pp. 156-157.

This Clause applies in all cases in which there is a relation of trust, whether the property is given in mortgage, or pawn, or simply deposited for safe custody, and oral evidence of the deposit, if otherwise trustworthy, is sufficient. *Ruttun Monee Dabea v. Gunga Monee Dabea*, 3 W. R. 94. But oral evidence cannot be admitted to show that a written deed, purporting to be a deed of absolute sale, was intended to operate only as a mortgage. *Kasheennath Chatterjee v. Chundy Churn Bannerjee*, 5 W. R. 68; *Moolook Chand Surma v. Kooloo Chunder Surma*, 5 W. R. 76.

In the case of *Roop Narain Singh v. The Government*, 2 W. R. 163, it was held that where upon the resumption of certain lands, the Collector annually set aside ten *per cent.* of the revenue as *malikana* allowance, he might be considered to be the depositary of such *malikana* allowance, and that the rightful owner might sue him in that capacity, and have, under this Clause, the privilege of a thirty years' limitation. The correctness of this decision may, however, be doubted. The appropriation by the Collector of a certain sum, to be paid out of the revenue to the owner of the land, can hardly be said to be a deposit in the ordinary sense of the word. Compare *Gobind Chunder Sein v. The Collector of Dacca*, 11 W. R. 491.

Where a mortgagor after the mortgage has been satisfied, sues for the recovery of the property mortgaged, the

limitation applicable is that provided by this Clause. But where he sues for surplus collections received by the mortgagee, the case falls within Clause 16 of this Section. *Jamal Ally v. Baboo Lall Doss*, 9 W. R. 187. In this case the Court observed:—"It has been said that a mortgagee after the mortgage has been satisfied, is in the position of a trustee for the mortgagor. We think he is not a trustee within the meaning of Section 2 of Act XIV of 1859. If he can be called a trustee, he is a trustee of the description falling under Clause 15, Section 1, and not a trustee of the description referred to in Section 2. We do not think it likely that the Legislature could have intended that a mortgagor, whose case is provided for by Clause 15, Section 1, and who is thereby limited to 30 or 60 years, should have the election of treating the mortgagee as a trustee, and saying that he comes within Section 2, and is barred by no length of time."

Where the mortgage of lands is proved, the circumstance that more than twelve years before the institution of the suit by the mortgagor to enforce restitution of the lands, the mortgage transaction had, on a demand made by the mortgagor, been repudiated by the mortgagee, will be no bar to the plaintiff's claim. The mortgagor's suit being brought within the sixty years prescribed by this Clause, the repudiation by the mortgagee cannot affect the period of limitation. *Esharee Dyal v. Ajoodhya Pershad*, 10 W. R. 219. But where there has been a long undisputed possession, which possession the defendant alleges to have been under a sale, the *onus* of proving that the possession was not of proprietary right, but was referable to a mortgage, lies on the person who claims to redeem as mortgagor. *Chundoo Lall v. Rughoo Nath Roy*, 3 Agra, 195.

Where a mortgagee has endeavoured by litigation to establish an absolute title in himself to immoveable property, inconsistent with the mortgage, and has failed, and

remains in possession, under the decision of a competent Court, on the title which he has sought by litigation to improve into absolute ownership, his possession during the pendency of litigation, although extending over more than twelve years, cannot be deemed adverse to the mortgagor, and a suit by the latter to redeem will be governed by the provisions of this Clause. *Tanji v. Nagamma*, 3 Mad. 137. In this case the Court observed:—"The period prescribed for suits against a mortgagee for recovery of immoveable property is sixty years, and that apparently altogether without reference to the nature of the title which the mortgagee in possession may assert. By an acknowledgment alone of the character provided by the Clause under notice can the period be extended, and by no process whatever can it be abridged." This observation, however, can only be taken to apply to cases in which the relationship of mortgagor and mortgagee is found to have remained unaltered. Where the mortgage has been duly foreclosed, the suit of a mortgagor seeking to redeem is barred unless brought within twelve years from the expiry of the year of grace. *Abdool Ali v. Looft Hossein*, 8 W. R. 476.

Where it appeared that the plaintiff's ancestor, the holder of certain lakheraj lands, had mortgaged them to the defendant, and that subsequently these lands were resumed and settled with the defendant as mortgagee, it was held by the Agra High Court that as the settlement of the resumed lands had been made with the defendant in the character of mortgagee, his possession could not be considered adverse to the plaintiff as mortgagor, and consequently that the limitation of three or twelve years could not apply to a suit by the latter to redeem. *Shah Baz Khan v. Ram Dial*, 1 Agra 15; *Oomrao Begum v. Nizamoonnissa*, 1 Agra 224. Compare *Lalla Hunooman Dobay v. Muddun Gopal Singh*, W. R. sr., p. 37, from which case it would appear that even where a settlement has been

made with the mortgagee as owner, the mortgagor's rights will not be affected. See, however, the earlier decisions of the Agra Sudder Court to a contrary effect, cited in *Macpherson on Mortgages*, 5th ed. pp. 117-119.

A mortgaged certain lands to B in 1844, and died in 1850. From the date of A's death down to the year 1853, A's daughter-in-law C was recognized by B as standing in the place of A. In 1853, C redeemed the mortgage of 1844, and executed a fresh mortgage in favour of B, by the terms of which she was to receive a yearly payment as Government revenue and quit-rent, which payment she continued to receive up to the year 1866, the mortgagee holding possession. In 1866, N, the nephew of A, sued C and B to redeem the mortgage of 1844, to set aside that of 1853, and to obtain possession of the property as heir of A. It was contended for N that, under this Clause, the limitation applicable to his claim was that of sixty years. But it was held by the High Court that his title, if he had any, must be taken to have accrued upon the death of A in 1850, that the possession of C, from that date, must be considered adverse so as to bar his claim as against her, and that he could not maintain his suit against B, since the adverse title of C stood in his way. *Nundo Coomar Lall v. Brojo Bhookun Singh*, 4 Wym. 36; compare *Makarum Ali v. Ruttun Beebee*, 2 Agra, 309.

A, the mortgagee of certain lands, obtained in 1835, a decree for foreclosure subject to the payment of two prior usufructuary mortgages. In 1844, B and C purchased the rights of the mortgagor in the mortgaged lands, and in 1854, redeemed the two prior mortgages. A thereupon sued B and C for recovery of the possession of the said lands. The defendants contended that A's cause of action had accrued when he obtained the decree for foreclosure, since he had, at that date, an immediate right of possession upon discharging the usufructuary mortgages, and that as more

than twelve years had elapsed since the date of that decree, the suit was barred. This view was adopted by the lower Courts, and A's claim dismissed. But it was held by the High Court on appeal that by the decree of 1835, A was placed in the position of the original proprietor, and might re-enter on paying off the former encumbrances *whenever*—the suit was brought before Act XIV. of 1859, came into operation—he chose; that B and C bought no right or title by the purchase of 1844, since the right and title of the mortgagor had already vested in A; and that subsequently in 1854, when the defendants discharged the prior mortgages they were still in the position of persons without adverse title, since they represented only the mortgagees whose interests had been assigned to them. The Court accordingly held that the law of limitation was inapplicable to the case. *Bhugwan Doss v. Behary Khan*, Marsh. 191.

An acknowledgment by a mortgagee of the title of the mortgagor, or of his right of redemption, although made in a writing passing between the mortgagee and a third party, and not addressed to the mortgagor himself, or to those who represent him, may be a sufficient acknowledgment within the meaning of this Clause to create a fresh period of limitation, there being nothing in the law which requires that such written acknowledgment should be made directly to the mortgagor. *Dur Gopal Singh v. Kasheeram Panday*, 3 W. R. 3. This decision of the Calcutta High Court has been followed by the High Court of Bombay in the case of *Ahiloji valad Khandoji v. Dongar Harichand Gujar*, 5 Bom. A.C. 176, in which COUCH, C. J., said:—"Considering that the word 'given' is used in this Clause, there might be a question whether the acknowledgment required is not an acknowledgment to the mortgagor. But without express words of the Legislature to that effect, I do not feel bound to put that strict construction upon the Clause. I think the words

‘given in writing’ are equivalent to ‘made in writing,’ and that any acknowledgment whatever, if in writing and signed by the mortgagee is sufficient.” To the same effect, the decision of the Madras High Court in the case of *Unicha Kandyib Kunhi Kutti Nair v. Valia Pidigail Kunhamed Kutti Maraccar*, 4 Mad. 359, and of the Agra High Court in the case of *Esree Singh v. Bishesher Singh*, 4 Agra, 255. In the latter case it was observed that words used in the Draft Act submitted to the Legislature, which would have required the acknowledgment to have been made directly to the mortgagor, had been omitted in the Act as it now stands. In the same case it was further held that where an acknowledgment in writing of the title of the mortgagor, had in the years 1820 and 1825, been given for the purposes of a suit then pending, by the mortgagee’s vakeel,—whose acts and statements for the purposes of such suit, were according to the law then in force to be deemed as if made in the presence of, and with the consent of his client,—such an acknowledgment was sufficient under the terms of this Clause to give the mortgagor a fresh period of sixty years within which he might sue for redemption. It may be noticed that under Section 4 of this Act, an admission of a debt in a writing addressed to a third party has been held not to be an acknowledgment keeping alive the debt. See the cases cited *postea*, in the remarks on Section 4.

Suits for the recovery, from the purchaser, of property bought *bonâ fide* and for valuable consideration from a depositary, pawnee, or mortgagee, are governed by the limitation provided in Section 5 of the Act.

The provisions of the Clause under notice apply only to suits for the recovery of property deposited, pledged, or mortgaged. A suit brought by an alleged mortgagor to set aside a mortgage deed on the ground that it is a forgery or has been fraudulently or wrongfully obtained, would be governed by the general rules of limitation

applicable to suits for setting aside deeds. Under Section 10 of the Act, the plaintiff's cause of action in such cases would be taken to arise at the time when the fraud became known to him.

The guardians of certain minors having mortgaged an estate belonging to them, and put the mortgagee in possession, subsequently sold the estate to the mortgagee. On a suit being brought by the minors to set aside the sale as not binding upon them, and for recovery of possession, it was contended for the defendant, that the minor's cause of action must be considered to date from the mortgagee's possession under the mortgage, and not from the sale, and that as their right to contest the mortgage had been lost by efflux of time, their claim was barred. But it was held by the Agra High Court that a separate and distinct cause of action accrued on the sale, and that limitation was not to be reckoned from the date of the mortgage. *Iradut Khan v. Debee Dyal*, 1 Agra, 180.

No special provision is made by this Clause as to the limitation to be applied in suits brought by depositaries, pawnees, or mortgagees, against depositors, pawners, or mortgagors, since such suits are governed by the provisions of other Clauses of the Act. But for convenience of reference the rules applicable to such claims may be shortly noticed here.

A suit for the recovery of money lent, instituted by a depositary or pawnee with whom moveable property has been pledged as security for the loan, will be governed by Clause 9, Clause 10, or Clause 16 of Section 1, according as the contract has or has not been reduced to writing, and has or has not been registered. The cause of action in such suits will accrue and limitation run from the date fixed by the contract for repayment. But although a pawnee's right to sue for the recovery of money lent upon the pledge of personal property may be barred by limitation, he still retains his right of lien. *Apparu Pillai v. Sub-*

raya Muppen, 2 Mad. 474. The widow of a Mahomedan in possession of her husband's estate under a claim for dower, has a lien upon it as against those entitled as her husband's heirs, and has a right to retain possession as against them until her claim for dower is satisfied. *Ameer-oonnissa v. Mooradoonnissa*, 6 Moore's I. A. 211; *Janee Khanum v. Oomatoool Fatima Khanum*, 8 W. R. 51; 9 W. R. 318; *Ahmed Hossein v. Khodeja*, 10 W. R. 369; *Syud Atahur Ali v. Altaf Fatima*, 10 W. R. 370; but compare *Saheebah v. Wafeah*, 8 W. R. 307; *Amanee v. Meer Meher Ally*, 11 W. R. 212.

The limitation applicable to a suit by a mortgagee to enforce payment of a money debt as a charge upon immoveable property mortgaged, is that of twelve years under Clause 12 of this Section. See the cases cited *supra*, pp. 164-166. The limitation provided by Clause 12, is also applicable in suits by mortgagees for possession of immoveable property mortgaged, and the period will be computed from the date on which the mortgagee was first entitled to possession. In the year 1840, A mortgaged certain lands to B under a mortgage deed in which it was stipulated that in default of payment in 1849, B should take possession. In 1847, A sold the same lands to C. In 1860, B sued for and obtained a decree for foreclosure against A, and in 1865, he instituted a suit against C for possession of the mortgaged lands. As it appeared from the evidence that C had been in possession from the date of his purchase, it was held that B's claim was barred under Clause 12, Section 1 of the Act. The Court observed:—"We think it clear that the plaintiff's right of action, that is, his title and power to demand present possession, accrued in 1849. The decree in the foreclosure suit gave him no new starting point, and can, in no way, affect the right of the now defendants who were not parties to that suit." *Huro Chunder Goocho v. Gudadhur Koondoo*, 6 W. R. 183.

Compare *Tarachurn Koondoo Chowdhry v. Khehul Chunder Ghose*, 6 W. R. 269.

Where a mortgage deed contained a condition that the loan should be repaid in nineteen years by annual instalments, and that the mortgagee should be entitled to foreclose and obtain possession as owner if any two instalments should remain unpaid at the time when a third instalment became due, it was held by the Agra High Court that the mortgagee was not restricted by this condition to foreclose so soon as the first default in paying three instalments had occurred, but that he might proceed to foreclose upon subsequent defaults, any previous default notwithstanding. The Court observed :—"The special stipulation does not express that on such default as is therein mentioned, the whole amount shall become payable ; nor is the owner limited so as to authorize foreclosure proceedings when, and so soon as the first default in the payment of three instalments occurs, *and not afterwards*. The deed gave to the mortgagees an inchoate and conditional right or interest in the land, which they might convert into a complete and absolute title of ownership ; and the power expressly conferred of foreclosing the mortgage when three annual instalments remained unpaid, is not inconsistent with the right attached by law, (Section 8, Regulation XVII of 1806,) to this description of mortgage, of foreclosing 'on the expiration of the stipulated period,'—i. e., at the end of nineteen years, or at any time before the sum lent is repaid." *Buldeen v. Golab Koonour*, 1 Agra, 102.

It has been already noticed (*ante*, p. 57,) that where a third party disputes the title of a mortgagor and obtains possession of the mortgaged lands under the decree of a competent Court, his possession is adverse to the mortgagee, whose cause of action against him to enforce the conditions of the mortgage, will be taken to accrue from the date when such adverse possession commenced. *Pros-*

sonno Coomar Sein v. Ram Coomar Sein, W. R. 1864, p. 375.

Where suits by mortgagees for the possession of immoveable property mortgaged are instituted in Courts established by Royal Charter, the period of limitation applicable will be that of twelve years; but, under the provisions of Section 6 of this Act, the time in such cases will be computed from the latest date at which any portion of principal money, or interest, has been paid on account of the mortgage debt. A written acknowledgment of the mortgage debt signed by the mortgagor, would probably be held, under Section 4 of the Act, to give the mortgagee a fresh period of limitation, in whatever Court his suit might be brought.

SECTION 1. CLAUSE 16.

To all suits for which no other limitation is hereby expressly provided —the period of six years from the time the cause of action arose.

Limitation of six years applicable to all suits not especially provided for.

IN the remarks upon the preceding Clauses of this Section, various cases have been noticed to which the general rule of limitation prescribed under this Clause has been held to be applicable. Reference may more particularly be made to the case of *Saduk Mundul v. Watson*, and the other cases cited in the remarks on Clause 2, *supra*, pp. 78-81, in which it was determined that in suits for damages for the wrongful removal and appropriation of personal property, the period of limitation is six and not three years; to the cases of *Shaikh Amjud Ali v. Syud Ali Buksh*, and *Radhanath Dutt v. Gobind Chunder*

Chatterjee, supra, pp. 83, 136-137, in which the same limitation was held to apply to actions for damages arising out of the tortious acts of servants or agents; to the case of *Doorga Mohun Doss v. Doorga Monee Dossee, supra*, pp. 137, 138, in which it was decided that a suit for contribution or reimbursement by a party who has paid the entire amount due under a joint decree, may be brought at any time within six years from the time when the payment was made; and to the case of *Chamur Ullah Sirdar v. Lokenath Holdar*, and the other cases cited *supra*, p. 144, in which the six years' rule of limitation was held to apply in actions arising upon registered contracts, or upon written contracts which could not by virtue of any Law or Regulation in force at the time and place of their execution, be registered.

The following additional examples may be given of cases to which the provisions of this Clause have been considered applicable. To a suit by an indigo planter under Section 3, Act X of 1836, for damages to the extent of the injury sustained, against a party who had induced ryots under contract with the plaintiff to cultivate indigo, to break their contract. *Forbes v. Protap Singh Doogur*, 7 W. R. 400. To a suit for the recovery of a Government promissory note, which, with other property belonging to the plaintiff, had been plundered by the rebels during the mutiny of 1857. *Syud Ali Nuquee v. Bhugwan Doss*, 1 Agra, 213. To a suit by a husband for the recovery of the person of his wife. The Court said:—"The decree should run that the wife be ordered to return to her husband." *Gungooa v. Bhugna*, 2 Agra, 170. Compare the case of *Ameer Chund v. Chotun Beebee*, 6 W. R. 105. To a suit by a mortgagor, after the mortgage has been satisfied, to recover surplus collections received by the mortgagee. *Jamal Ally v. Baboo Lall Doss*, 9 W. R. 187.

A died after taking from a mortgagee an assignment of certain mortgaged property. The mortgagor sued, and

obtained a decree for possession and for surplus proceeds, which he executed against B and C, two of the heirs of A, who thereupon sued D and E, the other heirs of A, for contribution. It was held that six years was the period of limitation applicable to their suit, and that their cause of action arose from the time when the mortgagor executed his decree against them. *Wullee Ahmed v. Jumeelun*, 10 W. R. 31.

A and B being engaged in the manufacture of salt, received advances from the Government Salt Agent, for the repayment of which A was security. The Agent sued A for the recovery of the advances, and obtained a decree against him in March, 1860. In execution of this decree, A having had to pay the whole sum advanced, sued B, his partner, for contribution. On it appearing that the partnership between the parties had terminated, and that an account had been struck in 1857, and that A's suit was not brought within three years from that date, the lower Court held that the claim was barred under Section 8, Act XIV of 1859; but it was held by the High Court on appeal that it was erroneous to apply Section 8 to the case, since the suit was not in the words of that Section, a suit for balance of account between merchants or traders who have had mutual dealings; it was further held that A's cause of action accrued when in 1860, under compulsion of the decree obtained by the Salt Agent, he repaid the whole advance for which his partner was jointly liable; and that as A had instituted his suit within six years from the time when his cause of action arose, and as no period of limitation is expressly provided for a suit of the kind, it must be taken to be governed by the Clause under notice, and so to have been brought within time. *Nobokristo Bhunj v. Rajbullubh Bhunj*, 3 W. R. 134.

No special provision having been made as to the period within which a suit by a partner for an account, and for a share of the profits after dissolution of the partnership,

should be brought, it has been held that such a suit is governed by the provisions of this Clause. *Puhul Chowdhry v. Bhutoo Ram*, 7 W. R. 36; *Kedar Nath v. Jawala Pershad*, 4 Agra, 175.

Where the manager of a joint estate sued for contribution, alleging that he had borrowed money and applied it in payment of certain joint family expenses, and that he had borrowed again to pay off the first loan, and had repaid the second loan from his private funds, it was held that his cause of action arose from the date on which he had made the payment on account of the joint estate, and that not having sued within six years from that date, he was out of time. *Ram Kristo Roy v. Muddun Gopal Roy*, 12 W. R. 194.

On the 5th July, 1865, A, one of the proprietors of a joint estate, sued B, his co-sharer, to recover money due by the latter on account of his share of the revenue of the estate, to the payment of which the Collector had applied a deposit made by A under Section 15, Act XI of 1859. A's claim embraced the payments or deductions made by the Collector out of the deposit, from January, 1860, to September, 1863. On behalf of B it was contended, *first*, that a deposit made by a sharer of an estate in order to protect his share from sale by reason of the default of his co-sharer, was "a payment under protest on account of arrears of revenue," within the meaning of Clause 4 Section 1, Act XIV of 1859, and that the limitation applicable to a claim for the recovery of money so paid was that of one year; *secondly*, if that were not so, that the claim fell to be disposed of under Clause 9 of this Section of the Act, and that consequently the plaintiff could not recover such instalments as had been paid by him more than three years before the institution of his suit. The Court was of opinion that neither Clause applied to the claim:—"There was clearly no payment under protest within the meaning of Clause 4, Section 1, Act

XIV of 1859; nor is the suit, we think, brought 'to recover money lent, or interest, or for the breach of any contract,' within the meaning of Clause 9. The defendant's liability arises from the fact that the plaintiff's money, deposited by him in the Collectorate, has been duly applied by the Collector in payment of arrears of revenue due from the defendant in respect of his share of the estate. These arrears were a charge upon the entire estate—including the plaintiff's share therein—which would have been sold for the arrears, had not the plaintiff previously made the deposit and signed the agreement of pledge provided for by Section 15, Act XI of 1859. Notwithstanding that it was at the option of the plaintiff to make such deposit and pledge, we think, that when made, the application of the money of the plaintiff thereunder, in discharge of the arrears due from the defendant, was a payment made on behalf of the latter, which he is bound by law to reimburse to the plaintiff. But this obligation arises not by virtue of any such contract as is contemplated by the 9th Clause of Section 1, Act XIV of 1859, but by the force of law. We, therefore, think that the 9th Clause does not govern this case; and, as no express limitation is provided elsewhere, that the suit must be governed by the 16th Clause." *Boykant Nath Bhooya v. Ram Nath Bhooya*, 4 W. R. s. c. 9.

While an estate was under *batwarah*, each of the co-sharers paid from time to time to the Collector, the amount which he believed to be due from himself on account of Government revenue. In the year 1857, an account was taken by the Collector, when a certain sum was found to be due to A, one of the co-sharers. In 1864, A demanded payment of this sum from the Collector who refused to pay it. A then sued for the amount. It was held that the case fell within the provisions of this Clause, and was barred as not brought within six years from the date when the sum was ascertained to be

due. *Gobind Chunder Sein v. The Collector of Dacca*, 11 W. R. 491.

In the case of *Syud Munsoor Ally Khan v. Rajah Prossonno Narain Deb*, Coryton, 25, it was observed by the Court that the period of limitation in suits between principal and agent, except in cases of fraud, is six years.

A, a *gomastah*, died while in the service of B. B sued the heirs of A to recover the aggregate amount of various sums of money drawn from time to time by A in excess of the wages due to him during the entire period of his service. It was held by KEMP, J., (E. JACKSON, J., dissenting,) that in the absence of any stipulation between the parties that the wages of A should be set off against the sums overdrawn by him, the claim for the recovery of such sums as were drawn more than six years prior to the institution of the suit, was barred by this Clause. *Kallee Kishen Paul Chowdhry v. Jugut Tara*, 9 W. R. 334. But on appeal, 11 W. R. 76, it was held by a Bench of three Judges, that looking upon the monies drawn by A in the same light as if they had been advanced to him by B for the general purposes of the business, B's cause of action would not accrue immediately upon the advance of the monies. There would be an obligation on A to render an account of his agency, and to account for the monies in question,—using the word *account* in its legal sense, as not confined merely to rendering an account of what he had done with the monies, but as including the payment of any balance which might be found due from him upon taking the accounts. A having died before he was called upon to account for, or to render an account of the sums drawn, a cause of action accrued against his representatives, so far as they had assets, to repay to the principal any balance which, upon the adjustment of the accounts, might appear due from A. The period of limitation was to be computed therefore, not from the time when A drew the monies, but from

the time of his death ; and as the suit was brought within six years of that time, the plaintiff was entitled to recover the full amount which, upon taking of accounts, might appear to have been over-drawn.

A vakeel having received money for his clients, gave it to their agent for delivery to them. The agent having failed to deliver it, the vakeel was compelled by the Civil Court to pay it over again, and thereupon sued the agent to recover the money so paid. It was held by the Madras High Court, *first*, that the case as being a suit for which no other period of limitation is expressly provided, fell to be disposed of under Clause 16, Section 1, Act XIV of 1859 ; *secondly*, that treating the case as one of implied contract, the plaintiff's cause of action arose when he was compelled to pay money which the defendant was legally bound to pay ; and *thirdly*, that if the defendant was in truth the plaintiff's agent, but had induced the plaintiff to make him so by the fraudulent representation that he was the agent of the clients, the cause of action should be taken to have arisen on the discovery of the fraud. *Subharamareddi v. Bhimaraju Ramaya*, 2 Mad. 21.

The decision of the Agra High Court in the case of *Baboo Lall v. Vaughan*, 2 Agra, 306, is not in accordance with the opinions expressed in the cases above cited. In this case the defendant had been employed by the plaintiff to collect debts due to, and to dispose of property belonging to the latter. The plaintiff sued for damages in respect of the loss arising from the misconduct of the defendant in neglecting to sue for the debts in due time, whereby they had become barred by limitation, and in so negligently selling the property that the proceeds could not be realized. It was held by the Court, MORGAN, C. J., and ROBERTS, J., that as the suit was based on the contract of agency, and the cause of action was the breach by the defendant of the implied contract duly to discharge the duties of the agency, the claim fell within Clause 9 of this

Section, and was barred as not brought within three years from the date of the breach.

Where in a suit by a trader against his commission agent for the price of goods sold through the latter, it appeared that there was an agreement, not in writing, that if the purchasers should fail to pay the price, the agent should make it good, it was held that the limitation applicable was that of three years under Clause 9, and not that of six years under this Clause. *Woonkar Pershad Rustobee v. Phool Koomaree Beebee*, 7 W. R. 67.

The limitation provided by this Clause has been held to apply to a suit to recover from the defendant the sum paid to the defendant's father as the purchase money of certain lands sold by him to the plaintiff, and for the recovery of the costs incurred by the plaintiff in defending his title against a prior purchaser of the same lands from the defendant's father. *Ramaswamy Mudali v. Valayuda Mudali*, 4 Mad. 266. In this case the Court observed :—" Assuming a breach of contract for which the plaintiff might have sued, that was clearly not his sole cause of action. The concealment and deception practised by the defendant on the execution of the deed purporting to transfer the title to the property, amounted to legal and moral fraud, which was itself a ground of suit for the recovery back of the purchase money paid." Compare the cases of *Rajnarain Singh* and of *Dwarka Doss*, cited *supra*, p. 143, in the remarks on Clause 10.

The six years rule of limitation will apply to a suit by A against B to recover money paid by the Government to B as compensation for land taken for a public purpose, the land being really the property of A. *Lalla Gopeenath v. Azroal Singh*, 8 W. R. 23.

The uncertainty which for some time prevailed as to the limitation applicable to suits for the price of goods sold wholesale, has been set at rest by a ruling of a Full Bench of the Calcutta High Court that such suits

fall to be disposed of under Clauses 9 or 10 of this Section, and not under Clause 16. *Lall Mohun Haldar v. Mohadeb Kattee*, 9 W. R. 193. See *ante*, pp. 129, 133.

A suit for the recovery of the amount due on a Policy of Marine Insurance also falls to be governed by the terms of Clause 10 of this Section. In such suits, in the absence of a custom allowing a certain term of grace, limitation begins to run from the date when the defendant has had notice of the loss, and refuses, or neglects to pay. *Narotamdas Bhagtandas v. Dayabhai Ichhachand*, 6 Bom. A. C. 34.

The limitation applicable in a suit by the payee against the maker of a promissory note which has been registered, is six years under this Clause, and under Section 51 of Act XX of 1866. See *ante*, pp. 145-146. But where, after such a note has been registered, the payee endorses it over to a third party, it has been held by the Madras High Court that a suit by the endorsee against the endorser for the amount of the note, must be brought within three years from the date of the endorsement. *Kylasanada Moodelly v. Armugum Moodelly*, 4 Mad. 366.

Where the heirs of a Mahomedan woman claim from her husband *mowjjul* or deferred dower, their claim is a simple money claim, founded solely on the contract entered into by the husband, and will be governed by the three years' rule of limitation provided by Clauses 9 or 10 of this Section, unless the contract be registered. *Amani v. Mir Mahar Ali*, 2 Ben. A. C. 306. In this case it was said by MACPHERSON, J., that as the claim was for deferred dower which did not become due or payable until the wife's death, there was no ground for saying that it was in the hands of her husband as a trustee, any more than there is ground for saying that every debt which is not paid on due date remains in the hands of the debtor as a trustee for his creditor. Compare *Saheebah v. Wafeah*, 8 W. R. 307. As to *mowjjul* or exigible dower,

see the case of *Mahomed Faaz v. Oomda Begum*, 6 W. R. 111, cited *postea*, under Section 2.*

A suit to set aside an order of a Deputy Commissioner of a non-regulation province, under which order the plaintiff had been compelled to pay Government revenue at an increased rate, is a suit for which no specific period of limitation has been expressly provided under this Act, and may consequently be brought at any time within six years from the date of such order. *Kebul Ram v. The Government*, 5 W. R. 47.

A suit to set aside a decree on the allegation that it has been obtained by fraud, is governed by the six years' rule of limitation provided by this Clause. *Ameen Chund v. Oomeid Singh*, 1 Agra, 114. A plaintiff sued to set aside a deed of sale and to obtain possession of certain property. It appeared that a decree for the possession of the property in dispute had been obtained in a suit on the same deed of sale brought by the defendant against the plaintiff's guardian. It was held that the plaintiff's suit was in fact a suit to set aside the former decree; that such a suit could only be maintained on the ground of fraud; and must be brought within six years from the date of the decree sought to be set aside, unless it could be shewn that the plaintiff had been fraudulently kept in ignorance of the transactions impugned, up to a time within six years of suit, so as to give him the benefit of Section 9 of the Act.† *Roopnarain Singh v. Jhisoman Koonwar*, 6 W. R. 165.

The Act containing no express provision as to the limitation which should be applied to a suit on a judgment of a Foreign Court, such a suit may be maintained at any time within six years from the time when the cause of action arose, that is to say, within six years from the date

* See also as to dower the cases cited *supra*, pp. 52, and 216. rather seem to be the Section applicable to a suit to set aside a

† Section 10 of the Act would judgment fraudulently obtained.

of such judgment. *Boloram Gooy v. Kameenee Dossee*, 4 W. R. 108; *Promothonath Ghose v. Heeramonee Dossee*, 8 W. R. 32. From the case of *Jussorut Khan*, cited *ante*, pp. 146-149, it might seem that not only the judgments of Foreign Courts, but also the judgments of the Civil Courts in this country afford causes of action which may be sued on at any time within six years from their date. But in the case of *Sandes v. Shaikh Jomir*, 9 W. R. 399, it was observed that the case of *Jussorut Khan* was heard on the original side of the Court where the principles of English law prevail; and that there would be no end of a case if a fresh suit might be maintained upon a decree. It was accordingly held that a suit could not be maintained in a Mofussil Small Cause Court to recover the unsatisfied balance of a decree of that Court. In the case of *Lakshamma v. Venkataragava Chariar*, 4 Mad. 89, on an application made by the widow and son of a deceased decreeholder for execution of the decree, it appeared that the right to execute was barred by Section 20 of this Act. In dismissing the application, SCOTLAND, C. J., said:—"It may be that a suit on the decree will lie, notwithstanding the enactment in Section 11, Act XXIII of 1861. We, however, give no opinion on the point, and the case of *Buddu Ramaiya v. C. Venkaiya*, 3 Mad. 263, certainly bears against the right of suit." It has been held by the Agra High Court that when the execution of a decree is barred by limitation, the decreeholder cannot proceed by a fresh suit on the decree to obtain what he should have sought for by execution. *Doobee Singh v. Jowkee Ram*, 4 Agra, 381; *Yaqoob Ali v. Khajeh Abdool Rahman*, 4 Agra, 383; see also the cases cited *ante*, pp. 53-54. But compare *Chunder Narain Ghose v. Gouree Nath Bose*, 4 W. R. s. c. 7.

There being no express period of limitation fixed by the Act for suits in cases of injury to real property, it has been held by the Madras High Court that the period of

six years given by this Clause will apply. *Viscambhara Rajendra Devu Garu v. Saradhi Charana Samantaraya Garu*, 3 Mad. 111; but see the cases cited *ante*, pp. 81-83, in which it would seem to have been the opinion of the Calcutta High Court, that the twelve years' rule of limitation is that applicable in such cases.

In the case of *Indhoobhoosun Deb Roy v. Kenny*, Mof. S. C. Ct. Ref., p. 106, it was held that a suit by a lessor for the value of trees cut down by his lessee contrary to the terms of the lease could not be maintained if instituted more than six years from the date when the trees were cut down. But in the case of *Ghufoorun Beebee v. Khwajeh Mus-tukedeh*, 2 Agra, 300, it was said:—"Trees are immoveable property, and the claim in connection with them relates to an interest in such property, and is subject to the limitation specified in Clause 12, Section 1, Act XIV of 1859." Compare *Choodhry Roostun Ali v. Dhandoo*, 4 Agra, 157.

Different views have been at different times expressed as to what rule of limitation should be applied to suits for the recovery of *wasilat* or mesne profits. In the case of *Khettermonee Dossee v. Goopeemohun Roy*, 1 Hay, 178, it was held under the old law of limitation,—Section 14 of Regulation III of 1793,—that where in a previous suit a party had obtained a decree for possession of lands, he might sue for the *wasilat* of the lands decreed for a period of twelve years prior to the decree—in computing which period the time during which the suit for possession was pending was to be deducted,—and that he might delay his suit for *wasilat* until twelve years after the suit for possession had been determined. Again, in the case of *Anundo Mohun Moitro v. John Gray*, W. R. 1864, p. 79, it was held that under the old law, the right of action for mesne profits must be taken to accrue from the date of the decree in a previous suit for possession of the lands in respect of which the claim for mesne profits is made. It was

further observed that the same rule would hold good under Act XIV of 1859, and that inasmuch as Clause 12, and not Clause 16, Section 1 of that Act, regulates the period of limitation in suits to recover an 'interest in immoveable property,' the period of twelve years within which suits for mesne profits might formerly be brought, is not altered.

But in the case of *Ranee Surnomoyee v. Onnoda Gobind Chowdhry*,* W. R. sp. p. 163, it was decided by a Full Bench of the Calcutta High Court, that a separate cause of action in respect of the wrongful receipt by a defendant of the rents or profits of land belonging to the plaintiff, accrues immediately upon the receipt by the defendant of each several sum. It was further observed in this case, that as Act XIV of 1859 does not contain the special provisions of Section 14, Regulation III of 1793, under which the period of the pendency of a suit for possession might be deducted in computing the time within which a suit for mesne profits might be brought, it would be prudent in plaintiffs for the future to include claims for *wasilat* in their suits for possession.

In the case of *Lalla Gobind Sahaye v. Monohur Misser*, 1 W. R. 65, it was held that the words 'interest in immoveable property' in Clause 12 of this Section, do not apply to claims for mesne profits, and that as there is no special law of limitation provided for such suits, the rule of limitation to be applied is that provided by the Clause under notice. To the same effect see also *Gooroo Dyal Singh v. Ram Surun Singh*, 1 W. R. 83, and *Issureenund Dutt Jha v. Parbutty Churn Jha*, 3 W. R. 13, in the latter of which cases it was decided that the privilege enjoyed by a plaintiff under the former law of limita-

* In this case the decision in the case of *Khettermonee Dossee* was referred to, as "an attempt to create a sort of double plea of limi-

tation for which there is no warrant under the Regulation of Limitation, or otherwise."

tion, of deducting the time during which his claim for possession was pending in Court, from the period within which a suit for mesne profits must be brought, no longer exists. Similarly, in the case of *Moharaj Kooer Runnaput Singh v. Furlong*, 3 W. R. 38, it was held that under the provisions of this Clause, mesne profits can be decreed for a period of six years only before the institution of a suit for their recovery, and that the cause of action in suits for mesne profits arises *from the date when they become annually due*,* and not from the date of the order of a Court restoring possession of the lands in respect of which they are claimed. See to the same effect *Ekbāl Ali Khan v. Kalipershad*, 3 W. R. 68; *Ranee Shama Soonduree v. Jardine, Skinner & Co.*, 3 W. R. 144; *Bulam Bhutt v. Bhoobun Lall*, 6 W. R. 78. In accordance with these decisions, the judgment of the Court in the case of *Anundo Mohun Moitro v. John Gray*, above cited, was altered on review, 6 W. R. 108, and mesne profits for a period of six years only prior to the date of suit were allowed. Compare *Protap Chunder Burrooah v. Ranee Surno Moyee*, 12 W. R. 5. *Kattama Nachiar v. Subbarama Aiyar*, 4 Mad. 302.

The only recent case which seems to conflict with the above rulings is that of *Joykurun Lal v. Ranee Asmudh Kooer*, 5 W. R. 125, in which it was held by PEACOCK, C. J., and L. S. JACKSON, J., in the case of a person who had been dispossessed under a judgment of a Court of competent jurisdiction, and afterwards restored to possession under a judgment of the Privy Council, that the right of action for mesne profits did not accrue until the judgment of the Privy Council had been pronounced.

Under the general law mesne profits can be decreed only for the six years before the institution of suit,

* Where the amount of mesne profits cannot be ascertained until the end of a year, the cause of action does not arise until the end of that year. *Byjnath Pershad v. Badhoo Singh*, 10 W. R. 486.

but, if at the time when a right of action for mesne profits accrues, the person to whom it accrues is under a legal disability, he will be entitled to an extension of time under the provisions of Sections 11 and 12 of the Act. A person who was a minor during the time mesne profits became due, may consequently recover all that became due to him during his minority, and is not restricted to sue for the collections of six years only. Mesne profits may likewise be awarded for more than six years in a suit for their recovery brought by the guardian of a minor during the minority. *Nooroonnissa Begum v. Shah Rukh Begum*, 6 W. R. 19; *Ombika Dossee v. Ramchunder Roy*, 7 W. R. 161. The ruling of a Division Court in the case of *Luchmun Singh v. Beebee Miriam*, 5 W. R. 219, that in no case is it possible to recover a balance of profits for more than six years, would therefore seem to be erroneous.

With reference to the rule of limitation applicable to claims for *malikana*, *todá garás*, and *hakks*, see *supra*, pp. 166-169. From the case of *Raiji Manor v. Desai Kallianrai Hukmatrai*, 6 Bom. A. C. 56, it would appear that when a *hakk* is not charged upon, or payable out of land, a suit for its recovery must be brought within six years from the last payment made on account of it.

SECTION 2.

No suit against a trustee in his lifetime and
Suits against trustees
 and their representatives
 for breach of trust, &c. no suits against his representatives for the purpose of following in their hands the specific property which is the subject of the trust, shall be barred by any length of time; but no suit to make good the loss occasioned by a breach of trust out of the general estate of a

deceased trustee shall be maintained in any of the said Courts unless the same is instituted within the proper period of limitation according to the last preceding Section, to be computed from the decease of such trustee; provided that

Proviso. nothing herein contained shall prevent a co-trustee from enforcing, against the estate of a deceased trustee, any claim for contribution, if he shall institute a suit for that purpose within six years after such right of contribution shall have arisen.

THE Indian Law Commissioners* thus define the term 'trustees' as employed in the corresponding Section of the Draft Limitation Act:—"By the term 'trustees' we mean what is popularly, and, in general, technically understood by it, namely, persons to whom property is conveyed in trust for specific purposes, by wills, settlements, and other formal deeds." From this definition it would seem to have been the intention of the Commissioners to limit the meaning of the word 'trustees' as used in this Section and in Section 5, to cases of direct, or express, as opposed to implied, or constructive trust. But as no definition of the term has been given in the Act, it has, in various decisions, been interpreted so as to include cases of the latter kind.

Thus it has been held that in a suit for possession by the purchaser of the share of a Mahomedan woman in her deceased father's estate, against her brother, limitation could not be applied, since while the property was in the hands of the brother, it was in the hands of a trustee. *Bacharam Chowdhry v. Mahtab Beebee*, W. R. 1864, p. 377. Compare *Salehoonnissa Khatoon v. Khyroonnissa*, 5

* In their Report dated the 25th March, 1843, paragraph 37.

W. R. 238, and *Bunshee Deb Surmah v. Chunder Kant Surmah*, 6 W. R. 61. It may be doubted, however, whether in these cases (in none of which was there any express trust), the provisions of this Section were properly applicable.

It has been held that the *moujjul*, or exigible dower of a Mahomedan woman in the hands of her husband, is to be considered as her estate held by him in trust for her. *Oomdah Begum v. Mahomed Faez*, 6 W. R. 111. It would perhaps be more correct to say that the possession by a Mahomedan of his wife's property during the continuance of the marriage, is the possession of the wife, and does not become an adverse possession until the marriage is dissolved. Compare *Kurrunnissa v. Abdool Ali*, 9 W. R. 153 ; *Shumsoonissa Begum v. Buz-lool-Rohim*, 2 Hay, 190. Assuming that in such cases the husband might be considered as a trustee for his wife during the continuance of the marriage, the trusteeship would terminate with its dissolution whether by death or divorce, and from that time the husband's possession would be adverse, whether as against the wife herself, or as against her heirs. *Amani v. Mir Mahar Ali*, 2 Ben. A. C. 306, cited *ante*, p. 226.

It has been already noticed that a mortgagee who continues to hold mortgaged property after the mortgage debt has been satisfied, is not a trustee for the mortgagor within the meaning of this Section. *Jamal Ally v. Baboo Lall Doss*, 9 W. R. 187.

In a case in which the plaintiff sued to recover a balance of money advanced from time to time to the defendant for the purpose of erecting buildings, &c., the defendant pleaded limitation, by reason that the money had been advanced more than three years before the date of suit. It was held that "the matter partook of the nature of a trust to which no limitation would apply." *The Rajah of Burdwan v. Narain Doss Chela*, 10 W. R. 174. But it is plain that this case was the ordinary case of

principal and agent, and should have been disposed of under Clause 16 of Section 1.

A *benamee* transaction does not create the relationship of trustee and *cestui que trust* between the *benameedar* and the real owner. *Dwarkanath Roy v. Wooma Soonduree Dossee*, 11 W. R. 72. In this case the Court observed :—“The Judge has, it would seem, treated a *benamee* transaction as creating the relationship of trustee and *cestui que trust* between the *benameedar* and the real principals. But there can be no greater reason for holding that no length of time is a bar to a suit to recover property on the ground that it is joint family property, when the property is purchased *benamee* in the name of one member of the family, than there is for holding that it would be so barred if the property stood openly and honestly in the names of all the members. It would be dangerous to hold that a *benameedar* is a trustee for the real owner within the meaning of Section 2, Act XIV of 1859; for if such were the case, a person might, after any length of time, sue another for recovery of property, by getting up a fictitious case against him,—however long he may have been in possession,—that the property was conveyed to him *benamee*.”

Where specific property which was the subject of a trust was not shewn ever to have come into the hands of the defendants, the executors of a deceased trustee, it was held that the provisions of this Section could not be applied. *Michael v. Gordon*, 2 Ind. Jur. N. S. 271.

Where no steps had been taken until the year 1864, against the assets of a defaulting executor who died in 1836, it was held that the claim of the representatives of the testator to a sum of money in the hands of the Administrator General, as representing the representatives of the defaulting executor, was barred by limitation. The Court, however, declined to express an opinion as to whether the claimant might not in another form of suit, follow the

assets under the provisions of this Section. *In re Palmer's Estate*, Coryton, 68.

Where it appeared that a defendant had been entrusted with the care and control of certain property for the benefit of the plaintiff's father, and had possessed himself thereof and afterwards appropriated it to his own use, and it was proved that in respect of any property in the hands of the defendant, he was liable as a trustee to the plaintiff, it was held that limitation could not under this Section, be pleaded as a bar. *Rama Rau v. Raja Rau*, 2 Mad. 114.

Ali Jan died leaving a will by which he set aside a portion of the income of his estate for religious purposes, and gave the remaining portion to his daughter Ahmudee and the children of his son Moostafa. Bunde Ali, the husband of Ahmudee, was appointed executor, and the whole estate was made over to him in trust, with directions to account to Ahmudee. Ahmudee and the immediate heirs of Moostafa died, but before Ahmudee's death, Bunde Ali granted certain *mokururee* pottahs of the property, and sold the reversion. Subsequently the heirs and representatives of Ahmudee and of the children of Moostafa, sued to recover the property from the grantees of the pottahs, and of the reversion, respectively, on the ground that the alienations were in breach of the trust reposed in Bunde Ali by Ali Jan's will. The defendant pleaded limitation, and the lower Court on a finding that more than twelve years had elapsed from the execution of the deeds of alienation before the institution of the plaintiffs' suit, held that their claim was out of time. But it was ruled by the High Court on appeal, that the finding of the lower Court was not conclusive, since if the defendants at the time of taking their respective interests, were cognizant of a subsisting trust affecting the property, or if reasonable enquiry would have made them so, they must be held to have taken the property subject to the trust,—notwithstanding that they may have paid full

value for it,—and would, in all respects, stand in the position of the original trustee. In such a case, the Court observed, the defendants would not be *bonâ fide* purchasers from the trustee, entitled to the benefit of Section 5 of the Act, but would themselves be trustees, within the scope of the Clauses of the Act which affect such persons. *Bego Jan v. Luteefun*, 5 W. R. 120.

Under this Section, no period of limitation can be applied in a suit by the heirs and representatives of the founder of a religious endowment to set aside incumbrances created over the endowed property by a *seait*, where the *seait* stands in the position of trustee for the founder. *Prossonno Moyee Dossee v. Koonjo Beharee Chowdhry*, W. R. 1864, p. 157. But in such cases nothing is to be presumed in favour of a plaintiff who brings forward claims so stale and antiquated, that difficulty arises in finding any trustworthy evidence whereby to decide on their validity and extent. *Lutafut Hossein v. Buzl Rohim*, W. R. 1864, p. 171.

Where a defendant holds lands as the deputy of the plaintiff, his holding cannot be regarded as adverse to the plaintiff. In such a case, it has been held that under the provisions of this Section, a suit by a plaintiff for recovery of possession is not barred, although the defendant be shewn to have held the land in question for more than twelve years. *Shaw Gholam Nujjuff v. Toosooduck Hossein*. 1 W. R. 126. Compare the cases relating to permissive possession cited *ante*, pp. 156-157.

SECTION 3.

When, by any law now or hereafter to be in force, a shorter period of limitation than that prescribed by this Act, is speci-

Shorter period of limitation, if prescribed by particular Acts, to prevail.

ally prescribed for the institution of a particular suit, such shorter limitation shall be applied notwithstanding this Act.

A COURT constituted under Act XXIII of 1863,—to provide for the adjudication of claims to waste lands,—has no power to extend the period of thirty days allowed by Section 5 of that Act for preferring a suit to contest an award of the Board of Revenue; and the filing of a vakalutnamah is not an institution of such a suit. *Taranath v. The Collector of Sylhet*, 5 W. R. w. L. R. 1.

By Section 25, Act XXVIII of 1860,—for facilitating the settlement of boundary disputes in the Madras Presidency,—regular suits of the nature of an appeal to set aside the decisions of settlement officers under that Act, should be instituted within two months from the date of such decisions.

In the case of *Judoonath Bhattacharjee v. Nobokisto Mookerjee*, 3 W. R. s. c. 2, the plaintiff sued to recover the consideration money paid by him to the defendant on account of a *durputnee* tenure, which tenure had become cancelled, under the provisions of Regulation VIII of 1819, by the sale of the *putnee*, in consequence of the defendant's failure to pay rent to the zemindar. The *durputnee* pottah under which the plaintiff claimed, stipulated that in case the *putnee* should be sold through the defendant's default, he should make good the loss to the plaintiff. The defendant pleaded limitation under Clause 5, Section 17, Regulation VIII of 1819, by reason that the plaintiff had not brought his suit within two months from the date of sale. The Court, however, held that the Clause and Section of the Regulation referred to, relate only to the disposal of the proceeds of a sale under the provisions of the Regulation, and could not be applied to a case in which it was not sought to recover compensation out of such proceeds.

As the plaintiff claimed under a written contract for the refund of a certain sum of money which he had paid to the defendant on the condition that it should be repaid by the defendant if the *putnee* should be sold, the period of limitation to be applied, was that provided under Clause 10, Section 1, Act XIV of 1859.

Section 111 of Act IX of 1850,—constituting the Courts of Small Causes in the Presidency Towns,—provides that all actions and prosecutions against any person for anything done in pursuance of the Act, shall be commenced within three calendar months from the date of the act complained of. The same period of limitation is provided under Section 53, Act XXIV of 1859, and under Section 4, Act V of 1861, for actions and prosecutions against Mofussil Police Officers: under Section 21, Act XXIII of 1857,—the Volunteer Act,—and under Section 214, Act VI of 1863,—the Customs Act,—for actions against any person for anything done in pursuance of these Acts. Similarly, under Section 49, Act XXXI of 1860,—relating to the manufacture, sale, &c., of arms,—suits brought under that Act must be instituted within three months from the accrual of the cause of action.

A zemindar having estates in two districts, after paying the Income Tax assessment for all his estates to the Collector of one district, was compelled by the Collector of the other district to pay over again the assessment leviable on the estate situated within that district. He thereupon sued both Collectors for a refund of the amount of the assessment which he had thus been compelled to pay twice over, but his suit not having been instituted within three months from the date of the second payment, the defendants pleaded limitation, under Section 245 of Act XXXII of 1860,—the Income Tax Act,—in which it is provided that “no suit, action, or other proceeding shall be commenced or prosecuted against any person for anything done in pursuance of this Act....after the

expiration of three months from the accrual of the cause of action." It was urged for the plaintiff, that this special provision was applicable only where the conduct of the Income Tax Officer had been legal; that the act of the Collector who had enforced a second payment of the tax was an illegal act, done without colour of, and contrary to the law; and, consequently, that a suit arising out of such an act was not governed by the special rule of limitation laid down in the Section of Act XXXII above cited. But the Court held that as in levying the tax, the Collectors were acting in their official capacity, whether they had acted legally or illegally, they were protected by the Section referred to, and consequently that no suit would lie against them which was not instituted within three months from the accrual of the cause of action. *Gooroo Dass Roy v. The Collector of Furreedpore*, 5 W. R. 137.

Under Act IX of 1860, claims arising out of disputes as to wages &c., between employers and workmen engaged in railway and other public works, may be tried before a Magistrate invested with special powers to try such claims, if preferred within six months from the date on which the cause of action arose.

By Clause 1, Section 24, Regulation II of 1819, a period of one year is prescribed as the time within which persons whose lands are assessed under that Regulation, may sue in the Civil Courts to set aside such assessment.

By Section 9, Act XXV of 1857,—relating to the forfeiture of property for mutiny,—suits to establish claims to forfeited property must be brought within one year from the seizure of the property claimed. A similar provision is contained in Section 20, Act IX of 1859. As to the construction of this Section, reference may be made to the case of *Gobind Panday v. Heemut Bahadoor*, 6 W. R. 42, in which it was held that a party claiming, under an alleged mortgage lien, possession of certain

lands which had been sold as the property of a rebel, must institute his suit within the period of one year fixed by the Act; and that it did not affect the case that the plaintiff had in the meanwhile been engaged in a suit to foreclose the mortgage. In this case it was contended for the plaintiff that although Section 20, Act IX of 1859, requires a suit to set aside the sale of a rebel's property made under that Act, to be brought within one year in the special Courts which are administered under that Act, there is nothing to prevent suits for confirmation of Civil rights, such as that of mortgage, from being brought in the ordinary Civil Courts, within the ordinary periods of limitation recognized in these Courts in such cases. It was, however, decided that the plea of a concurrent period of limitation within which suits might be brought in other Courts than those created under the Acts referred to, is not borne out by any express or implied provision of Section 20, Act IX of 1859. Compare *Prossonno Panday v. Gungaram*, W. R. 1864, p. 2; *Nepal Singh v. Ram Surun Singh*, W. R. 1864, p. 5; *Beebee Koolsom v. Nundun Singh*, W. R. 1864, p. 377; *Hafiz Ameer Ahmed v. Hafiz Nujjuf Ali*, 1 Agra, 46; *Mahomed Yusuf Ali Khan v. The Government*, 1 Agra, 191; *Ram Dhun v. Bhowance Singh*, 4 Agra, 139.

Under Section 1, Act XII of 1855, the Executors, Administrators, or Representatives of any person deceased may maintain actions for any wrong committed in the lifetime of such person which has occasioned pecuniary loss to his estate, for which wrong an action might have been maintained by the deceased; provided such wrong has been committed within one year before the death of such person, and the action is brought within two years from the commission of the wrong.

Under Act XIII of 1856,—for providing compensation to families for loss occasioned by the death of a person caused by actionable wrong,—an action is maintainable

against the wrong-doer, if brought within twelve calendar months from the death of the deceased.

Fixed periods within which suits may be maintained are prescribed by various English Statutes which have operation in India. By Statute 21, Geo. III. c. 70, s. 7, it is enacted that no prosecution or suit shall be carried on against the Governor-General or any Member of Council, before any Court in Great Britain, (the High Court of Parliament only excepted,) unless the same shall be commenced within five years after the offence committed, or within five years after his arrival in England. By Statute 33, Geo. III. c. 52, s. 162, and by Statutes 53, Geo. III. c. 155, s. 124, and 55, Geo. III. c. 84, s. 9, a term of three years, and by Statute 9, Geo. IV, c. 73, s. 51, a term of six months is prescribed for suits and prosecutions for anything done under, or by virtue of these Acts.

SECTION 4.

If, in respect of any legacy or debt, the person who, but for the law of limitation, would be liable to pay the same, shall have admitted that such debt or legacy or any part thereof is due, by an acknowledgment in writing signed by him, a new period of limitation, according to the nature of the original liability, shall be computed from the date of such admission; provided that, if more than one person be liable, none of them shall become chargeable by reason only of a written acknowledgment signed by another of them.

IN the case of *Nobin Chunder Mozoomdar v. Kenny*, 5 W. R. s. c. 3, the plaintiff, who had been employed

by the defendant as *gomastah* of an indigo factory, on monthly wages, left his service on the 27th October 1864, and subsequently, in the year 1865, sued for his wages from November 1863, up to the time of his quitting service. A portion of the plaintiff's claim was *prima facie* barred under Clause 2, Section 1, Act XIV of 1859, as not having been brought within one year from the time when the wages became due, but the plaintiff claimed exemption from limitation under that Clause, by reason that he had received from the defendant the following written and signed acknowledgment of the debt, dated the 27th October, 1864. "Nobin Chunder Mozoomdar, you are requested to come and take the salary due to you." The plaintiff urged that by this writing a new contract was created, to which either the three years' limitation provided in Clause 10, or the six years' limitation provided in Clause 16 of Section 1, should be applied. On the other hand, the defendant contended that as the provisions of Section 4, applied only to cases of "legacy" and "debt," and not to claims for "wages," his letter could not have the effect of renewing the term of limitation applicable to the plaintiff's claim; and, at any rate, that as the letter in question did not specify any particular sum as due to the plaintiff, it could not be regarded as such an admission of the claim as would create a fresh cause of action. Upon both of these grounds the lower Court held that the plaintiff's claim was barred, excepting that portion of it which was, according to the defendant's admission, within time. On a reference to the High Court it was decided that the case was governed by the rule of limitation laid down in Clause 2, Section 1, Act XIV of 1859. The Court observed:—"Servant's wages are a debt within the meaning of Section 4; and if the defendant had admitted a particular amount to be due to the plaintiff for wages, the period of limitation would have had to be computed from

the date of the admission. The new period of limitation would, however, have been the same as that fixed by Clause 2 of Section 1, since it is provided by Section 4, that the new period of limitation shall be computed according to the nature of the original liability. But in the writing on which the plaintiff relied, the defendant did not admit any particular amount to be due, nor did he admit wages to be due for any particular period. He merely admitted that something was due to the plaintiff for wages on the day when he left his service. An admission of this indefinite character could not extend the time from which the period of limitation was to be computed."

But in other cases it has been held that although the exact amount of the debt has not been ascertained at the time when the acknowledgment is given, and is not specified therein, it may be proved by oral evidence. *Young v. Mangalapilly Ramaiya*, 3 Mad. 308; *Pearee Lall Shaha v. Oomesh Chunder Mozoomdar*, 9 W. R. 140; *Sageman v. Oomesh Chunder Mookerjee*, 12 W. R. o. A. 2.

In the case of *Young v. Mangalapilly Ramaiya*, above cited, it was held by the Madras High Court that while a written admission of a debt with the appended averment that it is not yet payable in point of time, may be a sufficient acknowledgment of a debt within the meaning of this Section, a written statement that a sum of money will be payable on the accomplishment of a condition, that is, on the happening of an event future and uncertain, is not an acknowledgment of a debt. Since there may be a present debt, although there is not a present liability to pay, but there is no debt where the liability is dependant on a condition. In this case an opinion was also expressed that—on the analogy of the English decisions—an admission in writing made after action brought may be sufficient to bar the operation of limitation; but that it may be doubted whether such an admission in the answer in the actual suit under trial would suffice.

An admission in writing of the making of a promissory note, accompanied by a repudiation of liability in respect of it, has been held by the Bombay High Court not to be such an acknowledgment as would, under the terms of this Section, revive a barred claim. *Narbada Shankar v. Rughnath Ishvarji*, 2 Bom. 349.

The signature of the debtor must be attached to the written acknowledgment. An *unsigned* letter in which the debtor promises to pay by instalments will not give a new period of limitation under this Section. *Shah Mukhun Lall v. Nawab Imtiaz-ood-Dowlah*, 10 Moore's I. A., 362; *Ram Narain v. Huree Doss*, 4 Agra, 81. Compare, however, *Khucja Muhammad Janula v. Venkatarayar*, 2 Mad. 79, in which it was held by the Madras High Court that it was not necessary that the signature of the debtor should be formally subjoined or added to an acknowledgment written by himself, unless it appears from the writing that such signature was intended, or unless the writing would be incomplete in itself as an admission without a signature, in either of which cases the additional authentication by the debtor's signature would be necessary. The Court said :—" There may be a sufficient acknowledgment in writing though the signature of the party is not subjoined or added to the writing."

It was held in one case by a Division Bench of the Calcutta High Court that an acknowledgment in writing *sealed*, but not *signed*, by the debtor is not a sufficient acknowledgment within the provisions of this Section. The Court said :—" We are of opinion that so long as the acknowledgment is not a writing signed by the defendant, it is insufficient. Signing is one thing, and sealing another, and there is no evidence that in affixing his seal, the defendant meant it to be considered as his signature." *Ramzan Ali v. Luchmun Pershad*, 8 W. R. 513. But this decision was reversed on appeal.

The acknowledgment required by the Section must be

signed by the debtor himself. The signature of the debtor's agent will not renew the period of limitation. *Budhoobhoo-sun Bose v. Enact Moonshee*, 8 W. R. 1. An acknowledgment signed by one partner, although sufficient to interrupt limitation in respect of his own liability, will not continue the liability of another partner who has not signed such acknowledgment. *Khooshal Chund v. Palmer*, 3 Agra, 170. Where property has been devised by will to executors, any admission by parties other than the executors to the will would not bind the estate of the deceased, and the admission of one executor would not extend limitation as against another, at any rate where such admission has not been made in the character of executor. *Ramnarain Dey Sirkar v. Chunder Kant Mitter*, 8 W. R. 63. Compare *Rajah Icrara Das v. Richardson*, 2 Mad. 84.

The entire absence of such an acknowledgment in writing as is required by this Section to qualify the limitation prescribed by the other provisions of the Act, cannot be supplied by oral evidence of the defendant's admission of, and promise to pay the debt. *Kalika Sookul v. Greedharee Singh*, 7 W. R. 46; *Biressur Roy v. Ooma Soonduree Dossee*, 8 W. R. 289. Still less could a mere oral admission by the defendant's agent of the correctness of the plaintiff's accounts, be taken to give rise to a new period of limitation. *Woonkar Pershal Rustobee v. Phool Koomaree Beebee*, 7 W. R. 67. See the cases cited *ante*, pp. 138-142.

Nor will a part payment* whether of principal or inter-

* The Section as it originally stood in the Draft Act submitted to the Legislative Council on the 12th February, 1859, contained a provision by which "a part-payment on account of principal or interest" was allowed to give rise to a new period of limitation, but that provision was, on the motion of Mr. Peacock, omitted. Mr. Peacock said:—"This part of the Section is in accordance with the English Law. But I object to the

rule laid down by the English Law respecting the effect of a part-payment. That rule proceeded on the principle that a part-payment operates as an acknowledgment from which a new promise to pay may be implied. I am of opinion that in this country proof of part-payment should not have this effect." See the Proceedings of the Legislative Council of India for the year 1859, p. 58.

est proved to have been made by a debtor on account of his debt, keep alive his liability so as to enable the creditor to bring an action after the original period of limitation has expired; unless such part-payment has been accompanied by a written acknowledgment signed by the debtor. *Ramnarrain Chowdhry v. Bhugwan Joyey*, Mof. S. C. Ct. Ref. p. 92; *Gour Beebee v. Kissen Misser*, 1 Ind. Jur. N. S. 224; *Chamar Ullah Sirdar v. Lokenath Holdar*, Mof. S. C. Ct. Ref. p. 40.

In the case of *Rajah Iccara Das v. Richardson*, cited in the preceding page, BITTLESTON, J., observed:—"The part-payment of a debt has no effect in preventing the operation of Act XIV of 1859, as to the residue. The prescribed period of limitation begins to run as soon as the debt is payable; and, obviously, the payment of a part of the debt does not, in any degree, lessen the period during which the balance has been payable. But according to the decisions of the English Courts since the Statute of James, a part-payment has been treated as an acknowledgment of the debt, amounting to, or affording evidence of a new promise to pay the balance. It is upon this ground only that part-payment has, according to English law, the effect of giving a new period of limitation from the date of the part-payment. But Section 4, of the Indian Act expressly gives a new period of limitation in the case of a *written* acknowledgment of a debt, while it is wholly silent as to any such effect arising from part-payment; though in the Act there are two instances, Clause 13, of Section 1, and Section 6, in which the original period of limitation is made to run from the last payment on account. A reference to the English legislation on the same subject strongly supports the view, that the Indian Legislature did not intend that payment of part of a debt should give to the creditor a new period of limitation from that time. Before the Statute 9, Geo. IV. c. 14, the decisions had established three modes whereby a case might be

taken out of the operation of the Statute of Limitations. These were, *first*, acknowledgment by words, *secondly*, a promise by words, and, *thirdly*, part-payment; and that Statute since it provided that no acknowledgment or promise by words only should be sufficient for that purpose, and that nothing therein contained should take away the effect of any payment, clearly applied to the first and second methods only, and not to the third; so that when the English Legislature took away from parole acknowledgments, the effect which had been given to them by the decisions, they expressly reserved the effect of part-payment. Again, the Statute 3 and 4, Wm. IV. c. 42, s. 5, uses language very similar to that of the 4th Section of the Indian Act; but it expressly puts acknowledgment by writing and acknowledgment by part-payment on the same footing, and gives a new period of limitation from the one as well as from the other. The Statute 9 Geo. IV. was expressly extended to India by Act XIV of 1840, and the Indian Legislature must be taken to have had before them not only that Act, but also the other Acts of the English Legislature upon the same subject when they were framing the Act XIV of 1859. With these Acts then before them, they have expressly provided for the single case of an acknowledgment in writing, giving to that the same effect which it has by the English law, and so doing, have impliedly excluded every other acknowledgment—an acknowledgment by part-payment just as much as an acknowledgment by words only.” Compare *Khwajah Muhammad Janula v. Venkatarayar*, 2 Mad. 79.

In the case of *Kristna Rau v. Hachapa Sugapa*, 2 Mad. 307, it was held by the Madras High Court that a memorandum of a part-payment made in liquidation of a bond, endorsed upon the bond and signed by the debtor, was to be construed as an admission that the debt due upon the bond at the time the debtor signed the memorandum was the original amount secured by the bond, less the sum

stated to have been paid; and that such a memorandum was a sufficient acknowledgment within this Section to continue the liability of the debtor. This view has, however, been controverted by a Division Bench of the Calcutta High Court in the case of *Gorachand Dutt v. Lokanath Dutt*, 8 W. R. 335. In this case MACPHERSON, J., said:—"Part-payment being, according to repeated decisions both of this Court and of the Madras High Court, insufficient in itself to bring the case within Section 4, I cannot understand why it should be sufficient if a memorandum of it be made in writing and signed by the defendant. If the Legislature intended to allow an inference of a promise to pay to be drawn from a part-payment proved by a memorandum signed by the defendant, it is not easy to see why it should not have permitted a similar inference to be drawn from any part-payment well proved. But it is perfectly clear to my mind that what the Legislature intended, was to shut out inferences and deductions of all sorts, and to admit nothing short of a direct admission in writing. An express acknowledgment in writing that the debt is due, is a very different thing from a memorandum made by the defendant for his own protection and benefit that he has made a part-payment. The Madras Court says that such a memorandum warrants the inference of a promise to pay. I do not think that it warrants any such inference; and if it did, still as in drawing this inference, the Court has to go far beyond the actual writing, it would not be an acknowledgment in writing signed by the defendant. It does not necessarily follow that a debt is due because it has not been paid, for it may have been discharged in other ways than by actual payment; and what Act XIV of 1859 requires, is an acknowledgment in writing that the debt, or part of it, is due, not a mere acknowledgment of a fact from which it may be presumed that the debt, or part of it, is unpaid or due. I find that the opinion I now express is supported by a recent decision

of a Division Court in the unreported case of *Bishawkha Moyee Chowdhraïn v. Huro Soonduree Dabea*, in which a memorandum of payments made, endorsed on the bond, and signed by the defendant, was relied on as being an acknowledgment within the meaning of Section 4, Act XIV of 1859; but the Court—PEACOCK, C. J., and L. S. JACKSON, J.,—held that the endorsements did not amount to an acknowledgment, and that the suit was barred.”

Like Clause 15 of Section 1, the Section under notice contains nothing to show that the meaning of the word ‘acknowledgment’ should be restricted to a written admission or engagement to repay *addressed to the creditor*; and it might, therefore, be inferred on the analogy of the cases decided with reference to the meaning of the word as used in Clause 15 (see *supra*, pp. 213-214), that a written admission of the debt, signed by the debtor, although addressed to a third party, would be sufficient to revive the debtor’s liability. *Hurro Chunder Roy v. Monee Mohinee Dossee*, 3 W. R. s. c. 6.

But in the case of *Persaud Doss Dutt v. Deenonath Dey*, 2 Hyde, 14, it was held by LEVINGE, J., that an admission in writing to a third party, or stranger, that a debt is due and still unpaid, does not amount to an ‘acknowledgment’ within the meaning of this Section, in which the word must be taken to imply a liability or obligation,—an acknowledgment that the party to whom the debt is due, has still a right to recover. It was observed that there had been conflicting decisions in the English Courts as to the meaning of the word ‘acknowledgment’ in the first Section of Lord Tenterden’s Act, 9 Geo. IV. c. 14, but that the more recent decisions were opposed to the view that an admission to a stranger or third party that a debt is due, is sufficient to exclude limitation. Compare *Robertson’s case*, 2 Ind. Jur. n. s. 180. But see the remarks of the Privy Council in the case of *Gupikishen Goswami v.*

Brindaban Chandra Sirkar Chowdhry, 3 Ben. P. c. 37.*

In a suit against Government to recover compensation for certain lands taken by a Magistrate for the purpose of making roads, it appeared that the plaintiff had applied to Government for compensation, but, after various delays on the part of Government, had been refused compensation, and referred to the Civil Court. It was held that the plaintiff's cause of action arose from the time when he was dispossessed from his lands, and not from the date when his application for compensation was rejected; and that a letter from the Commissioner of Revenue, addressed to the Magistrate, expressing his willingness to recommend the Government to pay for the land, could not be considered an 'acknowledgment' within the meaning of this Section, so as to extend the period within which the plaintiff might bring his suit. *Hills v. The Government*, 11 W. R. 1.

In an unregistered bond made for the payment of money by instalments, a condition was inserted that on default made in payment of any one instalment, the whole amount should become due. Default was made in the payment of the first instalment, but, subsequently, payments were made by the debtor and accepted by the creditor in satisfaction of the instalments which had accrued due. A balance remaining due upon the bond, the creditor sued to recover the amount, instituting his suit more than three years from the date of the default in the payment of the first instalment, but within three years from the time when, taking into account the payments which had been made, the first instalment claimed became due. Limitation was pleaded for the defendant. It was argued that the plaintiff's cause of action must be taken to have arisen on the first default, when by the terms of the bond the whole amount secured thereby became due; and that the payments subsequently

* In the Bengal Law Reports this case is erroneously noticed as having been decided under Act XIV of 1859. The judgment expressly proceeds on the provisions of the old law of limitation.

made were ineffectual to interrupt limitation, inasmuch as it is provided by the Section under notice, that a written acknowledgment of the debt is necessary for that purpose. But it was held by the Bombay High Court that although the instalments were not paid by the defendant at the times fixed in the bond, yet as he had made payments on account of them, which had been so accepted by the plaintiff, these payments must, as regards both parties, be considered as if made at the times fixed; that, consequently, the defendant could not rely upon the stipulation which made the whole debt due on the failure to pay any one instalment, as determining the period from which limitation should run; and that as all the instalments claimed had become due within three years prior to suit, the suit was not barred. *Ram Krishna Mahadev v. Bayaji bin Santaji*, 5 Bom. A. c. 35.

In the case of *Hullothur Bangal v. C. S. Hogg*, 1 W. R. 189, in which the facts were closely similar to those in the case last cited, a similar view was taken by a Division Bench of the Calcutta High Court. It was observed, that where by the terms of a bond a cause of action accrues upon default in payment of an instalment, it is still competent for both parties, after such default, to show by their conduct that they treated the debt as one still payable by instalments; and that where the defendant has from time to time paid, and the plaintiff received sums of money on account of unpaid instalments of former years, the effect of such payment and acceptance is to waive any existing right to take advantage of a previous default, and to restore the provision for payment by instalments. Compare *Boroda Soonduree Dabea v. Shumbo Chunder Shaha*, 5 W. R. 45.

But with reference to the above decisions it is submitted that if a cause of action accrued for the whole amount due upon the bonds on the first failure to pay an instalment, it was not competent for the parties by any acts

of theirs, otherwise than as provided by the Section under notice, to alter the consequences which legally resulted from that fact. When the cause of action for the whole sum secured arose, limitation began to run, and mere payment of subsequent instalments could no more exempt from the operation of limitation, than part-payments on account of the principal or interest then due, could have that effect. There does not seem to be any real distinction in principle between the case of a contract to pay by instalments with a condition that on default of one instalment the entire sum shall be payable, and of a contract to pay at a future date by a single payment. Where A binds himself to pay B a certain sum at a future date, and fails to do so, B's cause of action arises from the time when A should have paid, and limitation will run against him from that time. If, during the currency of the period of limitation, or after its expiry, A should make, and B accept a part-payment of the debt, such payment and acceptance could not be construed as a waiver of the original condition as to the time when the debt was to be paid, and could, in no way, affect the operation of limitation. It might perhaps be said that in the cases above cited the conduct of the parties in making and receiving payments after the cause of action on the original contract had accrued, afforded evidence of a new and distinct contract having been entered into by the parties, for which the balance then due to the plaintiff was the consideration. This new contract, it might be argued, gave rise to an entirely new cause of action, with a new period of limitation to be reckoned without reference to the accrual of the cause of action upon the original debt. But to this it may be replied that the mere fact of the creditors continuing to receive instalments after the cause of action had arisen, if it proves anything, proves nothing more than that they slept over their rights, or did not understand them, but is no sufficient evidence of the making of a new contract. Compare

Karuppanna Nayak v. Nallamma Nayak, 1 Mad. 209, cited *ante*, p. 43.

In the case of *Hurronath Roy v. Maheroollah Moollah*, 7. W. R. 21, in which the facts were similar to those in the cases above referred to, it was held by a Full Bench of the Calcutta High Court that as the plaintiff's suit was brought upon the bond itself, and not upon any fresh agreement alleged to have been entered into between the parties, limitation must be taken to have run from the time when default was made in payment of the first instalment, in consequence of which the whole amount became due.

In the case of *Breen v. Balfour*, Bourke, 120, the plaintiff sued the defendant Balfour for the balance due upon a promissory note, of which he with two others were joint and several makers. The note which bore date the 20th August, 1857, was made payable by thirty-five equal instalments, the first of which was to fall due on the 10th September, 1857, and the rest were to be paid regularly every succeeding month. It also contained a stipulation that in case of default in payment of any instalment, or of any part of any instalment, on the day appointed for such payment, and notwithstanding that the same might afterwards be paid, the whole sum secured, or such part as might then remain unpaid, should immediately become due and recoverable. The instalment, which, by the terms of the note, should have been paid upon the 10th December, 1857, was not paid until the 5th January following, and, similarly, other subsequent instalments were not punctually paid. The last payment made, was made on the 14th January, 1860, on account of the instalment due on the 10th August of the previous year. The plaintiff having instituted her suit on the 6th January, 1865, the defendant pleaded limitation by reason that the suit was not brought within six years from the time the plaintiff's cause of action arose upon the default to pay the instalment due upon the 10th December, 1857.

It was contended for the plaintiff, on the authority of the decision in the case of *Hollothur Bangal*, that the payments made and accepted after the first default, indicated a waiver of the condition by which a right of action arose on such default, and, consequently, that all the instalments falling due within the six years next before suit might be recovered. It appeared on the trial that the money for which the note was given, had not, in fact, been lent to the defendant Balfour as a principal, but to Wilson another of the joint makers, by whom all the payments on the note had been made, and for whom the defendant Balfour was only a surety, and recognized as such by the plaintiff, and that no demand had been made on Balfour for any payment until subsequently to the year 1861, when Wilson obtained his discharge from all his liabilities under the Insolvency Act. It was held by the Calcutta High Court that the plea of limitation was a good answer to the action.

It was observed that by its peculiar terms the note was payable by instalments only until default. Upon the first default the whole remaining balance was to become due. There was no provision for any continuing liability to pay at stated intervals, and there was a stipulation which, in effect, provided that a default should not be waived. As this stipulation was evidently made for the protection of all parties, the sureties as well as the creditor, there could be no waiver by the creditor so as to affect the position of the defendant who was a surety. There was a default in payment of the instalment due upon the 10th December, 1857, and the plaintiff's cause of action arose immediately upon the failure to pay that instalment. The obligation to pay by instalments wholly ceased on the first breach, and the whole sum secured by the note became at once due. The plaintiff's only cause of action was that which accrued upon the first breach, and the claim was consequently barred.

As to whether the provisions of this Section can be taken to operate in extending the term for the execution of decrees, see *postea*, in the remarks on Section 20.

SECTION 5.

In suits for the recovery from the purchaser or any person claiming under him of any property purchased *bonâ fide* and for valuable consideration from a trustee, depositary, pawnee, or mortgagee, the cause of action shall be deemed to have arisen at the date of the purchase. Provided that, in the case of purchase from a depositary, pawnee, or mortgagee, no such suit shall be maintained unless brought within the time limited by Clause 15, Section 1.

Computation of period of limitation in suits to recover property purchased from depositaries, pawnees, or mortgagees.

Proviso.

THE meaning attached by the Indian Law Commissioners to the terms 'trustee, depositary, pawnee and mortgagee,' has already been noticed in the remarks on Clause 15 of Section 1, and on Section 2, in connection with which the present Section must be read and construed.

The terms of this Section are not very explicit as to the duration of the periods of limitation which they are intended to prescribe, and it is not easy to determine the effect which should be given to them. The first part of the Section provides that in suits for the recovery from the purchaser, or any person claiming under him, of any property purchased *bonâ fide*, and for valuable consideration, from a trustee, depositary, pawnee, or mortgagee, the cause of action shall be deemed to have arisen at the

date of the purchase. It is not here said whether as against such *bonâ fide* purchasers a different rule of limitation is to be applied from that which is provided for suits brought directly against trustees, depositaries, pawnees, or mortgagees, or against those who have purchased from them otherwise than *bonâ fide*. It may, however, be reasonably presumed that the intention of the Legislature in declaring that a new cause of action should be deemed to arise in cases of *bonâ fide* purchase, was to restore in such cases, and in such cases only, the operation of the general rules of limitation prescribed by the Act, as opposed to the special provisions of Clause 15, Section 1, and of Section 2. For example, where A deposits moveable property with B, which C afterwards purchases from B, *bonâ fide*, and for valuable consideration, A's right of action as against B, for the recovery of such property, will continue good—under Clause 15, Section 1,—for thirty years; but the right of action which accrues to A as against C, from the date of C's purchase, will be subject to the ordinary rule of limitation of six years provided by Clause 16, Section 1.

The second part of the Section provides that in the case of purchase from a depositary, pawnee, or mortgagee, no suit for the recovery of the property shall be maintained unless brought within the time limited by Clause 15, Section 1. This proviso* has equal reference to cases of

* The Section as it originally stood in the Draft Act submitted to the Legislative Council, did not contain this proviso, which was added when the Bill was before the Council on the 19th February 1859. In proposing the amendment Mr. Currie said:—"The Section as it stands is not quite correct. The maximum time within which suits could be brought against a depositary, pawnee, or mortgagee, under Clause 14, Section

1, of the amended Bill (Clause 15, Section 1 of the Act), is thirty years for moveable, and sixty years for immoveable property; so that, as the Section at present stands, if immoveable property were sold after the expiration of fifty-five years, a new term of limitation would commence, and would run for twelve years more, making a total of sixty-seven years, which was never intended: but it was intended that if property was trans-

bonâ fide purchase, and to purchases which are not *bonâ fide*, and its effect is, that in neither case can a suit be maintained after a period of thirty years where the property is moveable, and of sixty years where the property is immoveable.

It will be observed that the proviso contained in the latter part of the Section is silent as to purchases from trustees. The reason of this is that under Section 2, no maximum time is limited within which suits against trustees must be brought. A trustee by the subsistence of his trust is incapable of adverse possession, and as against him and his representatives, no suit for the recovery of the specific property which is the subject of the trust by those who are beneficially interested therein, can be barred by any length of time. So long, therefore, as the trust property remains in the hands of the trustee or his representatives, the right of action will continue. But the effect of the first part of the Section, as has already been remarked, would seem to place a *bonâ fide* purchaser from a trustee upon a different footing from the trustee himself, and to give such a purchaser the benefit of the ordinary periods of limitation to be computed from the date of the purchase. In this view it must be assumed that a *bonâ fide* purchaser from a trustee is not a representative of such trustee within the meaning of Section 2.

The next point to be determined in considering this Section, is the significance of the words '*bonâ fide* purchase.' For fixing the meaning of these words, reference has sometimes been made to the explanation of the words 'good faith', given in Chapter II, Section 52 of the Indian Penal Code, where it is declared that 'nothing is said to be done or believed in good faith, which is

ferred by a *bonâ fide* purchase, See the Proceedings of the Legislative Council of India, for the year 1859, p. 67.
the period should be shortened, but not in any case lengthened."

done or believed without due care or attention.' Accordingly, in the case of *Bego Jan v. Luteefun*, cited *ante*, p. 236, the Court held that where a purchaser is cognizant of a subsisting trust affecting the property which he purchases, or where by the exercise of due and reasonable care he might have become so, he is not to be considered a *bona fide* purchaser of such property, entitled to the benefit of the provisions of this Section; but must be held to have taken the property subject to the trust, notwithstanding he may have paid full value for it. Compare *Mancharji Sorabji Chulla v. Kongseoo*, 6 Bom. o. c. 59.

An estate purchased by A in the name of an idol, was subsequently mortgaged by him, but, on the loan being paid off, was reconveyed to the idol, when the names of the idol and its *sevait*, the infant son of A, were entered in the Collectorate books as owners. Afterwards the estate was again mortgaged by A, and to pay off this second mortgage, a third mortgage was on A's death executed by his widow, which last mortgage was foreclosed in the year 1820, by the mortgagee, who obtained a decree for possession. From that date the estate was held by B, under a title derived through the last mortgagee, up to the year 1867, when the representatives of the *sevait* sued to recover it as belonging to the idol. It was contended that A was a mere trustee for the idol, and that as B was cognizant of this, or might have learnt it by reasonable enquiry, he must be deemed to have taken the property subject to the trust, and so to be a *trustee* within the meaning of Section 2, as against whom a suit would not be barred by any length of time. It was held, however, by the High Court that as it appeared that A had dealt with the estate as his own, and there was no evidence of any formal dedication of it to the idol, it was reasonable to believe that the purchase in the name of the idol was a mere fictitious *benamée* trans-

action ; consequently, that the position of the last mortgagee, and of B claiming through him, was that of ' a *bonâ fide* purchaser for valuable consideration,' within the protection of this Section. *Brojo Soonduree Dabea v. Ranee Luchmee Koomaree*, 11 W. R. 13 ; *Gobindnath Roy v. Ranee Luchmee Koomaree*, 11 W. R. 36. Compare *Radhanath Doss v. Gisborne & Co.*, 5 W. R. 253, in which the meaning of the words ' *bonâ fide* purchaser' was carefully considered. It was observed in this case that " to make a purchase *bonâ fide*, the purchaser must have reasonable ground for believing that he buys a good title, although he may know that it is liable to attack ; the policy of the Law being that doubts should not hang for ever on titles, and that if a man, without fraud or concealment, purchases a doubtful title, it must be attacked within twelve years or never."

The decision of the Privy Council in the case of *Shaikh Indad Ali v. Kootbee Begum*, 3 Moore's I. A. 1, although pronounced with reference to the old law of limitation, may reasonably be applied to the provisions of this Section. It was held in this case that acquisitions of immoveable property which have been made under a title believed to be just and valid, though in reality insufficient, are protected by twelve years' possession ; and that as fraud and dishonesty are not to be assumed upon any ground, however probable, a plaintiff to avoid the effect of lapse of time must establish the existence of conscious injustice by proof.

It has already been noticed, *ante*, p. 210, that where a mortgagee remains in possession of mortgaged lands after the mortgage has been satisfied, he is not a trustee for the mortgagor, within the meaning of Section 2 of this Act. *Jamal Ally v. Baboo Lall Doss*, 9 W. R. 187.

Where a mortgagee in possession purchases the mortgaged lands at an auction sale for arrears of the revenue of such lands, it has been held that he acquires a new title, which if the mortgagor desires to dispute, he must

bring his suit within twelve years from the date of the sale. *Bykant Dhur Singh v. Lallah Bhagobut Sahay*, 2 Hay, 475. In this case, the Court observed that fraud will not be presumed from the circumstance that the revenue fell into arrears while the mortgagee was in possession, but it will be held, unless the contrary be proved, that the purchase was a fair and legal transaction. Compare, *Hurree Bullub Santra v. Ruttun Monee Dossee*, S. D. 1852, p. 392.

But where a mortgagee in possession allows the revenue to fall into arrear, with a view to the land being put up to sale, and his becoming himself the purchaser of it, and he does in fact so become the purchaser, such a purchase gives him no absolute title. "Upon such a purchase" it has been said, "a Court of Equity will on general principles, fasten a trust, and hold that the mortgagee, subject to the repayment of the amount due on the mortgage, and of his expenses properly incurred, is a trustee for the mortgagor." *Ojoodhyaram Khan v. Aushootosh Dey*, cited in *Macpherson on Mortgages*, 5th ed. pp. 85-86. The rule thus laid down has been approved of and confirmed by the Privy Council in the case of *Nawab Sidhee Nazir Ali Khan v. Ojoodhyaram Khan*, 10 Moore's L. A. 540.

SECTION 6.

In suits in the Courts established by Royal Charter by a mortgagee to

recovery from the mortgagee or the possession of the immoveable property mortgaged, the cause of action shall be deemed to have arisen from the latest date at which any portion of principal money or interest was paid on account of such mortgage debt.

Computation of period of limitation in suits in Supreme Courts by mortgagee to recover immoveable property mortgaged.

THE effect of this Section* when read together with Clause 12 of Section 1, was to give a mortgagee suing his mortgagor in the late Supreme Courts, for possession of immoveable mortgaged property, twelve years from the latest payment on account of the mortgage debt within which to bring his suit. Under the Letters Patent for the High Courts of Calcutta, Madras and Bombay the provisions of the Section will be applicable in suits brought before these Courts in the exercise of their ordinary original civil jurisdiction.

In declaring that the cause of action shall be deemed to arise from the latest payment on account of the mortgage debt, only in suits brought in Courts established by Royal Charter, the Legislature must be presumed to have intended that in similar suits brought in Courts not established by Royal Charter, the cause of action shall not be deemed to arise from the date of such payments on account. The limitation of suits by mortgagees for possession brought in the latter Courts will be governed by Clause 12 of Section 1, and will run from whatever date the mortgagee was first entitled to possession. *Huro Chunder Gooho v. Gudadhur Koondoo*, 6 W. R. 183; *Tarachurn Koondoo Chowdhry v. Khelut Chunder Ghose*, 6 W. R. 269. See *supra*, pp. 216-217.

Although no special provision is made by the terms of this Section for extending the period of limitation in cases where the mortgagor has signed a written acknowledgment of the mortgage debt, it may be assumed that such an acknowledgment would operate under Section 4, to create a fresh period of limitation.

* This Section was not contained in the Draft Act originally submitted to the Legislative Council, but was introduced on the motion of Sir J. Colvile when the Bill was in Committee. It was proposed

apparently without explanation, and agreed to without discussion or comment. See the Proceedings of the Legislative Council of India for the year 1859, p. 58.

SECTION 7.

In suits to avoid incumbrances or under-tenures in an estate sold for arrears of Government Revenue due from such estate, or in a Putnee Talook or other saleable tenure sold for arrears of rent, which by virtue of such sale becomes freed from incumbrances and under-tenures, the cause of action shall be deemed to have arisen at the time when the sale of the estate, talook, or tenure became final and conclusive.

THIS Section has special reference to the Laws which regulate the sale of estates for arrears of Government Revenue. Section 37, Act XI of 1859 declares that in the Provinces of Bengal, Behar and Orissa, the purchasers of entire estates sold under the provisions of that Act for arrears of Government Revenue, shall acquire such estates free from all incumbrances created after the permanent settlement, and shall be entitled to avoid all under-tenures, with certain specified exceptions. The power to dispute incumbrances is limited by the terms of the Section cited to the purchasers of entire estates. *Chundra Mohinee Dossee v. Kalidoss Ghose*, 8 W. R. 68. Where a share of an estate is sold under Section 13, Act XI of 1859, for arrears of Revenue due in respect of such share, the purchaser does not acquire it free of incumbrances, or with the right to avoid under-tenures. *Kasheenath Kooncar v. Bunko Beharee Choudhry*, 12 W. R. 440. Section 27 of Act XI of 1859, fixes the time when sales under the provisions of the Act become final.

As to the rights of a purchaser at an auction sale for arrears of revenue, reference may be made to the cases of *Huro Chunder Ghose v. Goluck Monee Dossee*, 8 W. R. 62; *Ranee Surnomoyee v. Maharajah Sutteeschunder Roy*, 10 Moore's I. A. 123; *Rajah Suttosurun Ghosal v. Mohesh Chunder Mitter*, 11 W. R. P.C. 10. See also the cases cited *ante*, pp. 55-56.

In the case of *Ranee Surnomoyee*, the question was raised but not decided, whether the power to dispute under-tenures and incumbrances is confined to the auction purchaser himself, or whether it can be exercised by others claiming through him. In respect to the auction purchaser's right to assess or resume *lakheraj* holdings, see *supra*, pp. 199 and 206.

The period of limitation applicable to the class of suits referred to in this Section will be that of twelve years as provided in Clause 12 of Section 1.

SECTION 8.

In suits for balances of accounts current between merchants and traders who have had mutual dealings, the cause of action shall be deemed to have arisen at and the period of limitation shall be computed from the close of the year in the accounts of which there is the last item admitted or proved indicating the continuance of mutual dealings; such year to be reckoned as the same is reckoned in the accounts.

THE following cases will illustrate the character of the dealings to which this Section is intended to apply.

In the case of *Bhoyro Doss v. Kallypersaud Agurwallah*, reported in "The Englishman" of the 4th May, 1863, it appeared that the parties to the suit were merchants, or traders, and that there was an account current between them, for the balance due upon which the plaintiff sued. This account was, on one side, of money from time to time lent, and of the price of a shawl sold to the defendant, and, on the other side, of payments made by the defendant to the plaintiff. The plaintiff stated, that he used to lend the defendant money and take *hoondees* from him, which were sometimes discounted, and at other times carried to the defendant's account in the plaintiff's books. The Court held that the transactions between the parties were not 'mutual dealings,' within the meaning of the Section. It was observed:—"The dealing between the plaintiff and the defendant consisted in the loan of sums of money by the former, and of payments on account by the latter. There was no dealing between them of any kind to raise a cross demand by the defendant against the plaintiff, in respect of goods sold or other matters. There was therefore no reciprocal dealing between them; and the plaintiff is consequently not entitled to avail himself for the purpose of instituting this suit of the mode of computing the time of limitation provided by Section 8, Act XIV of 1859." The suit was accordingly held to be barred by lapse of time. Compare *Enayet Hossein v. Ahmed Resa*, W. R. 1864, p. 235.

In the case of *Ghaseeram v. Monohur Doss*, 2 Ind. Jur. n. s. 241, it appeared that in the course of dealing between the parties the defendants sent goods to the plaintiff, and that they also paid *hoondees* on his account; that the plaintiff on the other hand remitted money to the defendants; and that sometimes the balance was in favour of the one party, and sometimes of the other. It was held by PEACOCK, C. J., and NORMAN, J.,—reversing the decision of PHEAR, J., to the contrary effect,—that the

dealings were 'mutual' within the meaning of this Section. It was observed by PEACOCK, C. J., that it was not necessary that there should have been such a buying or selling between each of the parties as would constitute him a 'trader' in the strict meaning of the term.

In the case of *Woonkar Pershad Rustobee v. Phool Koomarce Beebee*, 7 W. R. 67, it appeared that the plaintiff, who was a cotton merchant, used to send cotton to be sold by the defendant as his commission agent, under an arrangement that if the purchasers should fail to pay within a specified time, the defendant should make good the price. In the course of this dealing the defendant was credited with the amount due to him for commission and debited with the price of all cotton sold and not paid for by the purchasers. The transactions, which extended over a series of years, having been brought to a close, the plaintiff sued for the balance which upon examination of his accounts he found was due to him by the defendant, contending that the case, as a 'suit for a balance of accounts current between traders having mutual dealings,' was in time. The Court considered the dealings not to be such as the Section contemplated. They were dealings between the plaintiff as a principal, and the defendant as a *del credere* agent, and as such did not constitute the defendant a merchant or trader. Moreover, as the dealings were wholly of a one sided character, giving rise to no claim on the part of the defendant to anything beyond his commission, the accounts could not be regarded as accounts current of parties having 'mutual dealings.' Even if the Section applied, the Court was of opinion that as the liability of the defendant arose out of the engagement he had entered into to sell the goods of the plaintiff and guarantee their price, the suit, as a suit for a breach of contract not in writing, must be considered to fall under Clause 9, Section 1 of the Act, and reading that Clause along with the Section under notice, that the period of three years

limitation should be computed from the close of the year in the accounts of which there was the last item proved or admitted, indicating the continuance of the dealings. As it did not appear that there was any such item to be found in the accounts within the three years next before the commencement of the suit, the Court held the claim to be barred.

Where a plaintiff sued to recover money which he had advanced in payment of goods to be supplied by the defendant, his cause of action was held to have accrued at the time when the goods ought to have been delivered, the course of dealing not being considered to bring the case within the provisions of this Section. *Boiklonath Shaha v. Lalunnissa Beebee*, 7 W. R. 164. Compare *Doyle v. Khoosheel Khan*, 3 W. R. s. c. 1; *Doyle v. Edoo Ghazee*, 3 W. R. s. c. 13; *Virasvami Nayak v. Sayambabay Sahiba*, 2 Mad. 6.

Where a plaintiff, being a merchant, advanced certain sums to the defendant, who from time to time made repayments, the dealings were held not to come within the terms of this Section, since they were not 'mutual.' *Gobind Chunder Adly v. Pearce Mohun Bose*, 10 W. R. 56; *Rammurain Chowdhry v. Bhugwan Jokey*, Mof. S. C. Ct. Ref. p. 92.

SECTION 9.

If any person entitled to a right of action shall by means of fraud have been kept from the knowledge of his having such right or of the title upon which it is founded, or if any document necessary for establishing such right shall have been fraudulently concealed, the time limited for commencing

Computation of period of limitation in case of concealed fraud.

the action against the person guilty of the fraud or accessory thereto, or against any person claiming through him otherwise than in good faith and for a valuable consideration, shall be reckoned from the time when the fraud first became known to the person injuriously affected by it, or when he first had the means of producing or compelling the production of the concealed document.

SECTION 26, Act VIII of 1859, directs that where the plaintiff sues upon a cause of action which has accrued beyond the period ordinarily allowed by any law for commencing a suit of the nature brought, the ground upon which exemption from the law is claimed shall be stated in the plaint. This provision corresponds with that contained in Clause 2, Section 3, Regulation II of 1805, which requires that the plaintiff in his plaint or replication shall set forth distinctly the grounds on which he claims an extension of the ordinary period of limitation. Upon the analogy of the cases decided with reference to the provisions of that Regulation, it would appear that where a plaintiff upon the ground of fraud seeks to have his suit exempted from the operation of the ordinary rules of limitation, and disposed of as governed by the special rule contained in the Section under notice, he must distinctly set forth in his plaint the particular fraudulent dealing on the part of the defendant by which he has been injuriously affected, and not merely state in a general way that he has been defrauded. See the cases of *Rasmonee Dabea v. Brindabun Surma*, 1 Hay, 6; *Ramkanye Doss v. Kishen Chunder Roy*, *ibid.* 55; *Kashee Chunder Sein v. Tarakinkur Roy*, *ibid.* 325; *Shoomotee Dossee v. Biprodoss Chuckerbutty*, *ibid.* 377.

To affect the operation of limitation the fraud alleged must amount to a concealment of the plaintiff's cause of action, or of some document necessary to establish it, as provided by this Section; or it must form the foundation of the plaintiff's cause of action, as provided by Section 10. *Bromho Deo Narain v. Byjnath Sahaye*, 9 W. R. 255.

As to what may be taken to be a 'fraudulent concealment of a right of action, or of a document necessary to establish it,' see the cases of *Syud Ali Nuquee v. Bhugwan Doss*, 1 Agra, 213; *Robert & Charriol v. Lombard*, 1 Ind. Jur. n. s. 192; *Dhurumnarain v. Brijodoss*, reported in "The Englishman" of the 12th September, 1866.

SECTION 10.

In suits in which the cause of action is founded on fraud, the cause of action shall be deemed to have first arisen at the time at which such fraud shall have been first known by the party wronged.

Computation of period of limitation in suits where the cause of action is founded on fraud.

THE terms of this Section do not expressly provide for the case of a defendant who has purchased in good faith and for valuable consideration from the person guilty of the fraud. It may be doubted, therefore, whether as against such a purchaser, the cause of action should be deemed to have arisen from the date of the purchase, as is provided in Sections 5 and 9.

In the original Draft Act of the Indian Law Commissioners, after the words "at the time at which such fraud shall," were added the words "or with reasonable diligence might." These words were afterwards omitted, apparently upon the ground that the decision as to when

a party might, with reasonable diligence, have become acquainted with the fraud practised upon him, must almost always depend upon conjecture rather than actual proof.*

The fraud intended by this Section is the fraud against a plaintiff which constitutes the substantial matter of his complaint. *Raj Chunder Roy v. Bhugwan Chunder Roy*, 9 W. R. 553. Where B upon the fraudulent representation that he is the agent of C, obtains money from A, A's cause of action shall be taken to have arisen on the discovery of B's fraud. *Subharamareddi v. Bhimaraju Ramaya*, 2 Mad. 21.

Where a plaintiff under the old Law of Limitation sued to set aside certain deeds as fraudulent, alleging that he had only recently become aware of their existence, and it appeared from the evidence that he was not ignorant of their existence at a period more than twelve years prior to the institution of his suit, it was held that the suit was barred. *Sahebpersad Singh v. Ram Bahadoor Singh*, 1 Hay, 465.

A who had obtained a decree against B, sold it to C, but after the sale realized the amount of the decree from B. On application by C for execution, the fraud was detected. Subsequently C sued to recover from A the sum he had paid as purchase money. It was contended for A that the suit was barred as not brought within three years from the date of the purchase. But it was held that the limitation to be applied was that of six years, and was to be computed from the time when C became aware of A's fraud. *Gopal Chunder Dey v. Poorno Beebee*, 10 W. R. 104.

In a suit to recover money paid by Government to the defendant as compensation for land taken for a public purpose, which land the plaintiff alleged was his and not the defendant's, it was held that the plaintiff's

* Indian Law Commissioners' Reports for the years 1843-1844, p. 10.

right of action accrued at the time when the defendant received the money from Government, and that the ignorance of the plaintiff in regard to the accrual of his right, did not prevent time from running against his suit, unless such ignorance was brought about by the fraud of the defendant. *Lallah Gopeenath v. Azroal Singh*, 8 W. R. 23.

Where a plaintiff sued to recover possession of certain lands alleging that during his minority the defendant had fraudulently obtained possession thereof under a forged deed of sale, it was pleaded for the defendant that as the plaintiff had been out of possession for more than twelve years, and had not sued within three years from the date of his majority, his claim was barred. But it was held that if fraud were established, limitation would only run against the plaintiff from the time when it became known to him; and that in the absence of distinct proof that he had knowledge during his minority of the alleged fraud, the legal presumption was that he was ignorant of what had been done, and that he did not acquire the necessary information until he attained majority. *Bipro Churn Purohit v. Kulyan Churn Mookerjee*, 6 W. R. 321. Compare *Roop Narain Singh v. Jhisoman Kooncur*, 6 W. R. 165, and see the cases cited *ante*, pp. 41-42.

In the case of *Heeraloll Shaha v. Jadub Chunder Chenchey*, Coryton, 119, the plaintiffs sought to recover possession of a piece of land from which they alleged that the defendant had fraudulently dispossessed them. The defendant claimed to hold the land in dispute by purchase from one Parbutty, aunt of the first, and mother of the second plaintiff, and pleaded limitation. In giving judgment in this case PHEAR, J., is reported to have said:—"As to the lapse of time, although there is a little vagueness as to the exact period of dispossession, I think there is no doubt but that it occurred more than twelve years before the bringing of the suit, and that even any

additional time which may have been saved to the plaintiffs, or either of them, by reason of minority, has expired. But the view I take of the case renders it unnecessary to enquire into this question. In a Court of Equity a defendant cannot claim the benefit of the Statute of Limitations upon a possession which has been acquired by fraud, whether constructive or actual, unless the plaintiff has been guilty of such laches as to disentitle him to invoke the interference of the Court. Here, by the defendant's own account, the possession on which he relies, was obtained under and by virtue of the sale from Parbutty, a Hindoo widow. Now I need hardly say that in the case of a purchase from a Hindoo widow, the question whether or not the widow has in fact the power of alienating land, can only be rendered unimportant by the existence of the fact that the purchaser did *bonâ fide* enquire as to that power, and did reasonably satisfy himself that the circumstances were such as to confer it upon her, and if he did not so enquire, and the widow did not possess the power, then the pretended purchase is void, and is liable to be set aside at the instance of the heirs, as an act of constructive, if not of actual fraud, even though the period of limitation for suits may have elapsed."

The view intimated in the above remarks seems open to doubt. The Indian Limitation Act, as it expressly provides for the case of frauds, does not stand in need of, nor admit the application of equitable constructions. By the Section under notice it is expressly declared that in suits in which the cause of action is founded on fraud, the cause of action shall be deemed to have arisen at the time when such fraud shall have been first known by the party wronged. In the case of *Heeraloll Shaha*, therefore, it is submitted that the material question to have been considered by the Court in determining the issue of limitation was, at what time did the plaintiffs become aware of the

defendant's fraudulent dealing; since if they were aware of it at a time more than twelve years before the institution of their suit, their claim was barred under the ordinary rule provided by Clause 12, Section 1.* On this subject reference may be made to the observations of PEACOCK, C. J., in the case of *Poresk Narain Roy v. Watson*, 5 W. R. 283, where he remarks:—"The Law of Limitation in this country being express, dishonesty in obtaining possession will not prevent the possessor from availing himself of the provisions of that Law." Reference may also be made to the judgment of the Madras High Court in the case of *Peddamuthulaty v. N. Timma Reddy*, 2 Mad. 270, in which it was observed:—"In considering the application of the doctrine of laches, it must not be forgotten that the Limitation Act is here applicable to all suits; that while, until very recently, the English Courts of Equity only dealt with lapse of time in analogy to the Statutes of Limitation, in this country the Act applies to all suits." See also to the same effect the case of *Rama Rau v. Raja Rau*, 2 Mad. 114.

SECTION 11.

If at the time when the right to bring an action first accrues, the person to whom the right accrues is under a legal disability, the action may be brought by such person or his representative within the same time after the disability shall have ceased as would otherwise have been allowed from the time when the cause of

Computation of period of limitation in case of legal disability.

* Treating the case as a suit by reversioners to set aside alienations by the widow, the cause of action might be taken to have accrued on the widow's death.

action accrued, unless such time shall exceed the period of three years, in which case the suit shall be commenced within three years from the time when the disability ceased; but if, at the time when the cause of action accrues to any person, he is not under a legal disability, no time shall be allowed on account of any subsequent disability of such person or of the legal disability of any person claiming through him.

PERSONS who had attained majority before the passing of Act XIV of 1859, are not entitled after the Act came into operation to avail themselves of the old rule of limitation in respect of minority,* but must within three years from the time of attaining their majority bring their suits upon any cause of action which may have accrued, and in respect to which the term of limitation has run, while they were under a legal disability to sue. *Goluck Chunder Chuckerbutty v. Radhamonee Dossee*, 1 W. R. 52.

This Section was not intended to place minors under a special disability as contrasted with persons who are not minors, but to make a special concession in their favour. A party coming into Court after attaining his majority, if he is within the ordinary terms of limitation provided by Section 1, is not bound to avail himself of Section 11. Section 1 is complete in itself and applies to all suits. Section 11 is an additional or supplementary provision, giving minors liberty to take a fresh start in computing limitation from the time of their attaining majority, provided that the privilege so accorded is limited to three

* With respect to the old rule of limitation in cases of disability from minority and other causes, see *Macpherson's Civil Procedure*. 4th ed., p. 90.

years. For instance, where the prescribed period of limitation is twelve years, and the plaintiff's time for suing computed from his original cause of action, accruing in his minority, has also expired during his minority, or has less than three years to run at the time when he attains majority, he will have full three years within which to sue after he attains majority. But where the prescribed period has not so expired, and there are more than three years of the period of limitation still to run after the plaintiff attains majority, he may bring his suit at any time within the period remaining to complete the prescribed term of twelve years. So if there be six years of a term of twelve years still to run when the plaintiff attains majority, he will have six years within which to sue under the ordinary rule, and is in no way compelled by the provisions of Section 11, to bring his suit within three years. *Kalidoss Chatterjee v. Behareeloll Mookerjee*, 2 W. R. 305; see to the same effect *Guz Beharee Singh v. Beebee Washun*, W. R. 1864, p. 302; *Soorodhuny Dossee v. Bissumbhur Sircar*, 3 W. R. 21; *Abbas Ali v. Hurish Chunder Nag*, 5 W. R. 204; *Luchmun Singh v. Beebee Miriam*, 5 W. R. 219; *Poorun Singh v. Kasheenath Singh*, 6 W. R. 20; *Mohesh Chunder Kotwal v. Radha Mohun Gooee*, 7 W. R. 3; *Sree Pershad v. Rajgooroo Treeumbuknath Deo*, 10 W. R. 44; *Ramanuja Chariyar v. Venkataavaradhaiyangar*, 4 Mad. 54.

The guardian of a minor, suing on the minor's behalf, is entitled in computing limitation to a deduction by reason of the legal disability of the minor. *Ombika Dossee v. Ramchunder Roy*, 7 W. R. 161. So, in a suit by a minor through his guardian, mesne profits may be claimed for a longer period than six years, since the minor on attaining majority might have claimed for a longer period. *Shahzada Woola Gowhur v. Shah Rukh Begum*, 6 W. R. 19. Compare the cases cited *supra*, p. 233, in the remarks on Clause 16, Section 1. The extension of the period of limitation conceded to a minor on account of legal disability is

not affected by the fact that during his minority he has been represented by a guardian. *Mahipatray Chandra-ray v. Nensuk Anandray Shet Marvadi*, 4 Bom. A. c. 199. There is nothing to prevent a minor, when he comes of age, from proceeding upon any cause of action which his guardian, either through inadvertence or negligence has omitted to prosecute, for if the law were otherwise no minor would be safe. *Koylash Chunder Sircar v. Gooroo Churn Sircar*, 3 W. R. 43. Compare the cases of *Bhyrub Indernarain Raee v. Ranee Bhoobun Maye*, S. D. 1848, pp. 513, 676; *The Rajah of Burdwan v. Ram Jadub Ghose*, S. D. 1850, p. 157; *Zigumooz Zumman Chowdree v. Faqueerooddeen Mahomed Ahsan Chowdree*, S. D. 1852, p. 966.

In the case of *Anund Nath Roy Chowdhry v. Huro Soonduree Chowdhraiy*, 3 W. R. 8, it was held that a party who was a minor when an order was passed under Section 246, Act VIII of 1859, disallowing an application made on his behalf by a '*Khair-khwah*,' or 'well-wisher,' to stop the sale of certain lands attached in execution of a decree, might sue within one year after attaining majority to have the order set aside, the Court being of opinion that this Section will, in such a case, apply to and modify Section 246, Act VIII of 1859.

To entitle a plaintiff to the benefit of the deduction which this Section provides, his cause of action must accrue during the time he is under a legal disability. Whether a suit is brought by the guardian of a minor, or by the minor himself on attaining full age, no deduction can be made, unless the cause of action has first accrued to the minor himself during his minority. Where a person's legal disability has ceased, and an opportunity to sue upon the cause of action has accrued, no subsequent disqualification of such person, or of any person claiming through him, can operate to extend the period of limitation. *Obhoya Doorga v. Hurry Kristo Gope*, 10 W. R.

285; *Noor Mohammed v. Thakoor Beebee*, 1 Ben. s. n. 18. So where a plaintiff sues as representative of his father, upon a cause of action which had accrued during his father's lifetime, no deduction can be made in calculating the period of limitation on the ground of the plaintiff's minority. *Nusheerani Roy v. Shoshee Bhoosun Roy*, 5 W. R. 169; *Moteeloll Ghose Mundul v. Bhiloo Mundul*, 9 W. R. 251; *Mohabut Ali v. Ali Mahomed Koolal*, 12 W. R. 1. The provisions of the law on this point seem open to objection, and cases of extreme hardship must frequently arise. If, for instance, a father to whom a cause of action accrues should die immediately thereafter, leaving a minor son, the period of limitation might expire during the minority of such son without any opportunity being given him of asserting the right which the father had not time to assert. But see *Vira Pillai v. Muruga Muttayan*, 2 Mad. 340.

Under Act XIII of 1848, a plaintiff seeking to reverse an award of the Revenue authorities was bound to sue within three years, and no deduction or allowance was provided under that law on account of legal disability. Consequently, the agents, of whatever kind, of parties legally disabled from appearing themselves, were under obligation to appear for them within three years to contest such awards, and if they failed to do so, the parties for whom they acted were held to have lost their rights. *Gunganarain Sahay Roy v. Bahadoor Singh*, S. D. 1857, p. 1197; *Mohosoodun Singh v. Peertubullub Paul*, W. R. 1864, p. 140.

A plaintiff, an adopted son, sued in the year 1864, to recover possession of the estates A and B. It being admitted by the plaintiff, that his mother Taramonee had been dispossessed from the estate A in the year 1858, by a summary award, it was held by the lower Court, and by the High Court on appeal, that as Act XIII of 1848, was in force at the time the award was made, and as the limitation of three years prescribed by that Act was absolute,—no time being allowed to be deducted for any cause whatever in

computing the term,—the plaintiff's suit, which was not brought within three years from the date of the award, was barred, and that the plaintiff could derive no benefit from the fact of his having been a minor during the time when the period of limitation was running. In respect to the estate B, the plaintiff, alleged that the defendant took possession thereof in 1848, in conformity with an order passed by the Magistrate, under Act IV of 1840, dispossessing his mother Taramonee; that at the time his mother Taramonee was thus dispossessed, she held as guardian of a former adopted son who died in March, 1851; that he—the plaintiff—was adopted in 1852; that he attained majority in 1862, and that his suit being brought in 1864, within three years from the time when he came of age, was in time under the provisions of the Section under notice. It was held by the lower Court, that as it appeared from the plaintiff's own statement that Taramonee was under no legal disability to sue as for her own rights between the time of the death of her first adopted son and the time when the plaintiff was adopted by her, limitation must be taken to have begun to run, at any rate, from the 1st April, 1851, and consequently—as no deduction could be allowed in computing the period of limitation on account of subsequent disability—that the plaintiff's suit which was not brought until upwards of thirteen years from the 1st April, 1851, was barred. But it was held by the High Court that as the plaintiff was the heir neither of his adopted brother who died in infancy, nor of his mother, it followed that when the cause of action arose, and previous to his adoption, no one through whom he claimed was in possession of the property of which the lands in dispute formed a portion; that limitation, therefore, could not run against him until his adoption, at which time he was a minor, and that his suit which was brought within three years from

the time when his minority ceased must be considered to be within time. *Huro Chunder Chowdhry v. Kishen Coomar Chowdhry*, 5 W. R. 27. This decision was, however, reversed on review, 7 W. R. 134, and the opinion of the lower Court that a right of action having accrued to Taramonee when she succeeded to the estate on the death of the first adopted son, limitation, running from that time, could not be defeated by the disability of the plaintiff subsequently adopted, was substantially confirmed.

A suit by an adopted son after Act XIV of 1859, came into operation, to set aside acts done by his adopting mother, during his minority, to the injury of his estate, if not brought within twelve years from the time when the acts were committed, must be brought within three years from the time when the plaintiff attains majority, and no deduction can be allowed in computing the period of limitation by reason that subsequent to the time when he attained majority, suits in which the validity of his adoption was at issue, were pending. *Muddun Mohun Tewaree v. Kishen Mohun Koondoo*, 5 W. R. 32; *Muddun Mohun Tewaree v. Nund Kishore Doss Mohunt*, 5 W. R. 295.

The provisions of this Section cannot be used for the purpose of altering the period of limitation prescribed in Act X of 1859, with regard to rents. *Dinonath Panday v. Roghoonauth Panday*. 5 W. R. x. 41. The Court in this case observed that "it could scarcely have been the intention of the Legislature that if a person was an infant at the time his rents became due to him, he should be allowed three years after the attainment of his majority for the purpose of suing his ryots for rent due, inasmuch as such a provision would in some cases give him a right to sue for his rents eighteen or twenty years after they became due."

As to whether the provisions of this Section can be extended to applications for the execution of decrees, see *postea*, in the remarks on Section 20.

SECTION 12.

The following persons shall be deemed to be under legal disability within the meaning of the last preceding Section—married women in cases to be decided by English law, minors, idiots, and lunatics.

What persons to be deemed to be under legal disability.

WITH reference to the exceptions from the ordinary rules of limitation on the ground of legal disability provided by Sections 11 and 12, the Indian Law Commissioners observe in their Report dated the 21st March, 1842 :—" We have thought it proper to specify the causes for which exception from the rules of prescription shall be allowed, and not to leave any discretion to the Courts. We see no reason to provide for any cases other than those we have specified."* As this intention, however, has not been expressly declared in the Act, it has sometimes been contended that the enumeration of instances of disability in the Section under notice is not exhaustive, and that there may be other disabilities besides those therein mentioned. See the cases of *Robert & Charriot v. Lombard*, 1 Ind. Jur. N. S. 192; *Muddun Mohun Tewaree v. Kishen Mohun Koondoo*, 5 W. R. 32; *Muddun Mohun Tewaree v. Nund Kishore Doss Mohunt*, 5 W. R. 295. In the case last cited, the Court declared it to be their opinion that the persons enumerated in Section 12, were the only persons who can ever be said to be under a legal disability within the meaning of Section 11.

* In the original Draft Act prepared by the Indian Law Commissioners, "coverture" was not included as a disability, the Commissioners being of opinion that the identity of interests between

husband and wife would in general be sufficient to ensure attention to her pecuniary claims against third parties. See Reports of the Indian Law Commissioners for the years 1843-1844, p. 38.

To the same effect, *Ram Kishore Acharj Chowdhry v. Luckhee Dabea Chowdhrair*, W. R. 1864, p. 290.

The Revised Draft Act for the Limitation of Suits submitted by the Indian Law Commissioners to the Legislature with their Report dated the 1st October, 1842, contained a provision that for the purposes of the Act the term of infancy should in all cases be taken to extend from birth to the end of eighteen years. This provision was not embodied in the present Act, and questions have in consequence arisen as to the time at which minority should be held to terminate.

The term 'minors' as used in this Section, must be construed according to the law of the party in each case. *Hari Mahadaji Joshi v. Vasudev Moreshear Joshi*, 2 Bom. 344.

By Section 28, Regulation X of 1793, the minority of Hindoo and Mahomedan proprietors of estates paying revenue to Government was limited to the expiration of the fifteenth year; but by Section 2, Regulation XXVI of 1793, this rule was rescinded, and the minority of such proprietors was declared to extend to the end of the eighteenth year. In the case of *Pogose v. Bykantnath Roy Chowdhry*, 5 W. R. 2, the question was discussed, whether the terms of the latter Regulation extend the period of minority in the case of proprietors of estates, generally, and in relation to all contracts, to the end of the eighteenth year, and prolong the period of legal disability to that age, or whether they merely extend minority in matters connected with the minor's real estate, leaving him in all matters of personal contract in the same position in which he was before the Regulation was passed, namely, a minor only to the end of the fifteenth year. In determining this point the Court observed:—"We think that the question admits of one answer only. Minority is a legal personal disability. It may be placed arbitrarily at one age or another. But having been determined to extend

either generally or as to a particular class, up to a certain age, it is accompanied by complete disability, unless the law has expressly declared otherwise. Now the words of Section 2, Regulation XXVI of 1793, clearly extend the term of minority to a class of persons, but do not limit it to a class of subjects. We have no doubt therefore that they extend the legal disability attending minority to any act of a proprietor of estates under the full age of eighteen years. The reason of the thing supports the law as we read it; since it is unnecessary to remark upon the unreasonableness of finding the same person a minor as to some transactions and a major as to others, liable on account of some, non-labile on account of others."

In the case of *Ranee Roshun Jahan v. Rajah Syud Enaet Hossein*, W. R. 1864, p. 83, and 5 W. R. 4, the Court held that the extension of the period of minority to the eighteenth year under Section 2, Regulation XXVI of 1793, was applicable to proprietors out of possession, as well as to those in possession of lands paying revenue to Government.

Where the plaintiff is not a proprietor of land paying revenue to Government, and the subject matter of litigation is not an estate held under Government, the rule as to the period of minority was at one time thought to be different. In the case of *Juggessur Hati v. Deobo Moyee Dossee*, 1 W. R. 75, it was held by the High Court on appeal, that as in all matters unconnected with the possession of estates held under Government, the minority of male Hindoos terminates, according to the Bengal School of Hindoo Law, with the completion of the fifteenth year, the lower Court was wrong, where the property in dispute was not an estate held under Government, to deduct eighteen years as the period of the plaintiff's minority in computing the term of limitation. In the case of *Monsoor Ali v. Ramdyal*, 3 W. R. 50, the plaintiff sued to recover his share of his deceased father's estate from his brothers,

who, as he alleged, had kept him out of it from the time of his father's death. The defendants pleaded limitation. The determination of this issue depended upon the time at which the plaintiff's minority should be taken to have terminated. The plaintiff contended that as under the provisions of Section 26, Act XL of 1858,—*for making better provision for the care of the persons and property of minors in the Presidency of Fort William in Bengal*,—his minority did not terminate until he attained the age of eighteen years, his suit was in time. The Court, however, held that the words of the Section—"For the purposes of this Act every person shall be held to be a minor who has not attained the age of eighteen years,"—must be taken to restrict its operation to cases in which the minor's estate is actually taken charge of by Government in the manner provided in the Act; that except in such cases the minority of male Hindoos terminates with the completion of the fifteenth year; and that as the property claimed by the plaintiff had not been taken charge of by Government, the period of his minority must be held to be governed by the general rule. In giving judgment in this case, PHEAR, J., observed that he followed the rule laid down by the Court in the case of *Juggessur Hati*, but that he entertained doubts as to the correctness of the decision in that case. He thought that if the Legislature could be considered to have used the words in Section 26 of Act XL of 1858, "for the purposes of this Act," as equivalent to "relative to all that forms the subject of this Act," then the limit of minority as regards the exercise of proprietary rights would be fixed at the age of eighteen years for all cases whatsoever, and all cause of anomaly would disappear.

The questions raised in the cases above cited may be considered to have been set at rest by the ruling of the Full Bench of the Calcutta High Court in the case of *Debigobindo Newjee v. Modhoosoodun Manjee*, 10 W. R.

F.B. 36, in which it was held that under the provisions of Act XL of 1858, every person—not being a European British subject—who has not attained the age of eighteen years, is a minor, and that he is a minor whether proceedings have been taken under that Act for the protection of his property and the appointment of a guardian, or not. Compare *Oosun Beebee v. Mahomed Arsud Chowdhry*, 2 W. R. 217.

It was held by the late Sudder Court, that as there is nothing to prevent a person under sentence of imprisonment for an affray from instituting and prosecuting a suit through law agents, the term of imprisonment ought not to be deducted in computing the period of limitation. *Nujeeba Khatoon v. Mirza Nawab Hossein*, S. D. 1859, p. 1509.

SECTION 13.

In computing any period of limitation prescribed by this Act, the time during which the defendant shall have been absent out of the British territories in India shall be excluded from such computation unless service of a summons to appear and answer in the suit can, during the absence of such defendant, be made in any mode prescribed by law.

To entitle a plaintiff to the benefit of the provisions of this Section, it is not necessary that his cause of action against the defendant should have accrued during the defendant's absence. Limitation having begun to run while the defendant is within the British territories in India, will be interrupted in his absence unless he can

be summoned to appear and answer in the plaintiff's suit.*

It will be observed that the terms of this Section provide only for the absence of a defendant, and not for the absence of a plaintiff. Where a plaintiff contended that his claim was not barred, inasmuch as a deduction fell to be made of the period during which he had been absent beyond seas in imprisonment and transportation,† it was held that the deduction could not be allowed, since no exception was provided by the Act for *plaintiffs* who are beyond seas whether voluntarily or involuntarily. *Shoobool Koolal v. Domun*, 10 W. R. 253; compare *Venkatasubha Patta v. Giri Ammal*, 2 Mad. 113.

It has been held by the Madras High Court that the provisions of this Section cannot be applied to give an extension of the period allowed under Section 20 for executing decrees. *Darsiah Chinniah Chenchu v. Godain Chetty Veeriah*, 4 Mad. Jur. 101. The correctness of this opinion may perhaps be questioned.

SECTION 14.

In computing any period of limitation prescribed by this Act, the time during which the claimant, or any person under whom he claims, shall have been engaged in prosecuting a suit upon the same cause of action against the same defendant, or some person whom he

Computation of period of limitation in case of suit prosecuted *bona fide*, but in wrong Court.

* Section 60, Act VIII of 1859, provides for the service of summons in cases where the defendant is resident out of the British territories in India, and has no agent in India empowered to accept service for him.

† The interruption to limitation on the ground of imprisonment which was formerly allowed in England, has been done away with under the Statute 19 & 20, Vict. c. 97, s. 10.

represents, *bonâ fide* and with due diligence, in any Court of Judicature which, from defect of jurisdiction or other cause, shall have been unable to decide upon it, or shall have passed a decision which, on appeal, shall have been annulled for any such cause, including the time during which such appeal, if any, has been pending, shall be excluded from such computation.

THE provisions of this Section do not apply to cases in which the right of the claimant has been judicially determined, but to suits which through error have been in good faith instituted in a Court not having jurisdiction, and in which consequently no judgment has been given. *Kalee Chunder Chowdhry v. Ruttun Gopal Bhadooree*, 2 W. R. MIS. 1; *Nundoo Lall Sirkar v. Dwarkanath Biscas*, 2 W. R. 9.

It has been decided by a Full Bench of the Calcutta High Court that the words "or other cause" used in this Section must be taken to mean "other cause of like nature with defect of jurisdiction." Where a plaintiff suing in a Court of competent jurisdiction has been non-suited through his own neglect, whether in wrongly stating his case, or in failing to appear and produce his witnesses, he cannot be said to have been prosecuting his suit *bonâ fide* and with due diligence. He cannot, consequently, be allowed in reckoning limitation in a subsequent suit against the same defendant upon the same cause of action, to deduct the time during which the former suit was pending. *Bissessuree Dabea v. Chunder Madhub Chuckerbutty*, 6 W. R. 184. *Haradhun Dey v. Ramdoss Dey*, 6 W. R. 15; *Brindabun Chunder Sirkar v. Dhun Monee Chowdhraïn*, 7 W. R. 160; *Oodoy Monee Dabea v. Bishonath Dutt*, 9 W. R. 455.

Where after issue of summons, it is found that the defendant has died before the institution of the suit, the

Court has no jurisdiction to try the case. But in a subsequent suit on the same cause of action against the representatives of the deceased, the time during which the first suit was being prosecuted by the plaintiff *bond fide* and with due diligence, may be deducted in computing limitation. In such a case the Court will have to determine whether in the first suit the plaintiff was not wanting in due care and caution in not ascertaining whether the defendant was alive or dead at the time the suit was commenced. *Mohun Chunder Koondoo v. Azeem Ghazee*, 12 W. R. 45.

The provisions of this Section will apply to a case in which the plaintiff has instituted a previous suit against the defendant, but has been unable, after due diligence, to procure due service of the summons upon the defendant to appear and answer the claim, and has consequently been unable to prosecute the suit to a decision. *Karuppan Chetti v. Veriyal*, 4 Mad. 1.

Where a plaintiff claims that the time during which a former suit was pending should be deducted in computing limitation, and it appears that the former suit was not brought by the plaintiff, nor by any one through whom he claims, no deduction can be allowed under the provisions of this Section. *Borodakant Roy v. Sookmoyee Mookerjee*, 1 W. R. 29.

In computing limitation no deduction can be made under this Section for the time during which the plaintiff was litigating with another defendant on the same cause of action. *Munna Jhunna Koonwur v. Laljee Roy*, 1 W. R. 121. The rule under the old law was the same. *Ajoodhya Mitter v. Sreenarain Behara*, 1 Hay, 303.

In a suit brought against two defendants A and B, the plaintiff claimed that in reckoning the period of limitation, a deduction should be made of the time during which he had been engaged in prosecuting a former suit upon the same cause of action against A alone, which

former suit had been nonsuited by reason that B had not been joined as a defendant. The Court held that no deduction could be made upon such grounds. *Kristo Doss Surmokar v. Nilmadhub Surmokar*, 5 W. R. 281.

The terms of the Section provide for a deduction only in cases in which a claimant "shall have been engaged in prosecuting a suit upon the same cause of action against the same defendant." It has been held, however, that these words are to be construed *liberally* and not *literally*, and that a deduction should equally be made of the period of pendency of a former suit, in which the claimant was maintaining against the same party the same claim as defendant, which in the subsequent suit he prefers as a plaintiff. *Din Dyal Chatterjee v. Maharajah Jugutendur Buncaree*, 1 W. R. 310. But the correctness of this decision may be questioned.

A suit was instituted in a Moonsiff's Court. On enquiry the Moonsiff ascertained that the suit was inadequately valued, and that on a true valuation, he had no jurisdiction to try it. He therefore returned the plaint that it might be presented in the proper Court. The plaintiff then filed his plaint in the Sudder Ameen's Court. It was there objected that the suit was out of time. But it was held that the time during which the plaintiff was proceeding in the Moonsiff's Court was to be deducted in computing limitation, since the circumstance of the claim having been insufficiently valued, was not conclusive against the *bona fides* of these proceedings. *Chandi Dasi v. Janakiram*, 1 Ben. s. n. 12. But compare *Indhoo Bhoosun Deb Roy v. Hurronath Roy*, W. R. 1864, p. 280.

In excluding from the period of limitation the time during which a former suit was pending, the day on which the proceedings in that suit were commenced, and the day on which they ended, should both be counted. *Hurro Soonduree Dabea v. Kally Mohun*, W. R. sr. p. 46.

In computing the period of limitation in a suit for possession by a purchaser at a sale in execution of a

decree, the time during which a suit by the judgment-debtor to set aside the sale was pending, must be deducted. *Gopal Chunder Ghose v. Raj Chunder Dutt*, 2 W. R. MIS. 9.

B having failed to pay the amount due upon a bond which he had made in favour of A, executed a *kistibundee* in substitution thereof, upon which A sued and obtained a decree. During the Mutinies the record of the suit and the decree were burned. Subsequently A brought a fresh suit, which he based upon the original bond in lieu of which the *kistibundee* had been given. The High Court threw out the suit, but gave A leave to sue for any balance which might still be due upon the former decree and the *kistibundee*. A sued accordingly. The lower Court finding that there was a former decree for a certain sum due upon the *kistibundee*, and that there was no proof of any payment having been made by B, gave a decree for the said sum with interest. On appeal, it was urged that A's suit was out of time, but it was held that inasmuch as the suit thrown out by the High Court, although not in form the same as that subsequently brought, was the same in substance,—the cause of action in both being the debt due to A, whether due on the original bond or on the substituted *kistibundee*,—and inasmuch as the Court was unable in the former suit owing to the erroneous form in which it was brought, to adjudicate on the claim, the plaintiff was entitled under the provisions of the Section under notice, in reckoning the period of limitation, to deduct the time during which the former suit was pending. *Golab Koonwur v. Shah Keramut Hossein*, 3 W. R. 101.

But the correctness of this decision may well be doubted. In the first place, it may be questioned whether any action would lie on the lost decree, see *ante*, p. 228. In the second place, it does not appear that the suit brought, after the decree had been lost, upon the original bond, was thrown out by the Court from any defect of the Court's jurisdiction.

The fact that the plaintiff had brought a suit in an erroneous form, and that it had consequently been nonsuited, would not, according to the views expressed by PEACOCK, C. J., in the case of *Bissessuree Dabea*, above cited, be any ground for deducting the period of the pendency of the first suit in bringing a subsequent one.

This Section contemplates two classes of cases, *viz.*, cases in which a plaintiff fails to obtain a decision on his claim in the Court of first instance; and cases in which a decision given in favour of a plaintiff in the Court of first instance is annulled in the Court of appeal. It contains no express provision for the case of a plaintiff who failing to obtain a decision in a Court of first instance, has tried to remedy his failure through a Court of appeal. It has, however, been decided that the time during which such an appeal was actually pending should be excluded in reckoning limitation in respect of a subsequent suit, since a plaintiff who seeks through a Court of appeal to compel a Court of first instance which has refused to take up his case, to do so, may be said to be "engaged in prosecuting a suit" within the meaning of the Section. *Rajkrishna Roy v. Beerchunder Joobraj*, 6 W. R. 308. In this case the Court further decided that as the period within which an appeal must be brought is fixed by the law with a view to give the unsuccessful party time to deliberate whether or no he shall contest the decision which has been given against him, he may be taken to be proceeding with due diligence if he appeals at any time within the prescribed period.

A, holding a decree of a Court of Small Causes against B, caused a boat, the property of C, to be attached as B's property. A petition filed by C, under Section 246, Act VIII of 1859, in which he claimed the boat as his, was rejected by the Small Cause Court Judge on the 22nd January, 1864, and the boat was accordingly sold in execution of A's decree and was purchased by D. On the

30th July, following, C instituted a suit in the Moonsiff's Court against A, B and D, to establish his right of ownership in the boat, which suit was dismissed by the Moonsiff on the 29th September, 1864, on the ground that he had no jurisdiction. Against this decision C, on the 13th November, 1864, appealed to the Zillah Judge, who upon the 29th March, 1865, confirmed the decision of the Moonsiff. C thereupon instituted a fresh suit against the same defendants in the Small Cause Court. The defendants pleaded that the claim was barred under Section 246, Act VIII of 1859, as not brought within one year from the date of the order of sale. The plaintiff on the other hand contended that in accordance with the provisions of the Section under notice, the time during which the previous suit and the appeal therefrom were pending should be deducted in reckoning the period of limitation. The Judge of the Small Cause Court being of opinion that when the Moonsiff decided that he had no jurisdiction to try the plaintiff's claim, it was the clear duty of the plaintiff at once to have brought his suit in a Court having jurisdiction, and not to have appealed from the Moonsiff's decision, held that only the time during which the plaintiff's suit was pending in the Moonsiff's Court, and not the time during which the appeal was pending, should be deducted in reckoning limitation, and that as the deduction of the time during which the suit was before the Moonsiff did not bring the case within the prescribed period of one year, the suit was barred. But on a reference to the High Court it was decided, that the time during which the plaintiff had been prosecuting his appeal *bona fide* and with due diligence, as well as the time during which he had been engaged in prosecuting his case in the Court of first instance must be deducted in computing limitation. The Court observed :—" The plaintiff was prosecuting his suit within the meaning of Section 14, Act XIV of 1859, while he was prosecuting his appeal.

The Moonsiff held that he had no jurisdiction, and the appellate Court, affirming that decision, held that it had no jurisdiction. The words in Section 14, 'or shall have passed a decision which on appeal shall have been annulled for any cause, &c.,' apply to cases in which a plaintiff has prosecuted his suit with effect, and in which, upon appeal prosecuted by the defendant his adversary, the decision either of the Court of first instance or of the first Court of appeal, has been annulled. It is not certain that a plaintiff, *bonâ fide* resisting an appeal filed on the ground of want of jurisdiction would not be prosecuting his suit *bonâ fide*. The words were probably inserted to prevent any misconception on that point." *Shumboonath Biswas v. Kistodhone Sircar*, 5 W. R. s. c. 8.

Property belonging to C was sold in execution of a decree and was purchased by A. Subsequently, B, having also obtained a decree against C, proceeded to attach the same property in execution. A objected, but the Principal Sudder Ameen overruled his objections, and on the 10th May, 1861, directed attachment to issue. A thereupon appealed to the Zillah Judge who reversed the order of the Principal Sudder Ameen. The order of the Zillah Judge was in turn reversed by the High Court upon the 10th April, 1863, it being held that as the Principal Sudder Ameen's order for the attachment of the property, passed under the provisions of Section 246, Act VIII of 1859, admitted of no appeal, a claimant's only remedy under that Section was the institution of a regular suit. C accordingly instituted a regular suit, which was dismissed by the Court of first instance as not brought within one year from the date of the order for attachment. On appeal it was held by the Zillah Judge that the word *suit* as used in this Section, was not to be limited to a regular suit, but comprehended litigation of any kind between the parties, and that deducting the time during which the former ineffectual litigation had been pending,

the plaintiff's suit was in time. This ruling was, however, reversed by the High Court where it was held that as the terms of Section 246 of Act VIII of 1869, prohibit procedure by appeal, and direct procedure by regular suit, the plaintiff, who notwithstanding the express language of the law had elected to proceed by appeal, could not be considered, within the meaning of Section 14 of the Limitation Act, to be 'prosecuting a suit *bonâ fide* and with due diligence' so as to be entitled in bringing his second suit, to deduct the period of former litigation. *Watson v. Ramdoss Baboo*, W. R. 1864, p. 371; *Monohur Lall v. Futteh Ram*, 4 Agra, 39.

In the case of *Muddun Mohun Tewaree v. Kishen Mohun Koondoo*, 5 W. R. 32, the plaintiff, an adopted son, sued to set aside certain acts of his adopting mother in alienation of the estates of his adopting father. The defendants in possession of the estates pleaded limitation by reason that the plaintiff's suit was not brought within twelve years from the date of the acts which he sought to set aside, nor within three years from the time when he attained majority. In reply, the plaintiff contended that in computing the period of limitation a deduction should be made of the time during which he was engaged in prosecuting as against his adopting mother, and against those who on failure of his right would have been heirs of his adopting father, successive suits to establish the legality of his adoption. The lower Court decided that as the plaintiff was in no position to sue until his right to the succession had been determined, the time during which the former litigation had been pending should be deducted. But this decision was reversed by the High Court on appeal. The Court observed that the deduction contemplated in Section 14 Act XIV of 1859, is of the pendency of suits of an entirely different character as therein specified; and that the circumstance of the plaintiff's right of succession being under litigation, in no way interfered with

his right of suit to set aside alienations, since when he sued his mother to establish the legality of his adoption, he might at the same time have sued to have her acts set aside. See also the case of *Muddun Mohun Tewaree v. Nund Kishore Doss Mohunt*, 5 W. R. 295.

In a suit by a mortgagee for possession of certain lands included in the mortgage deed, against a person who subsequently to the date of the mortgage had purchased these lands from the mortgagor, the pendency of a previous suit by the mortgagee against the mortgagor for foreclosure, affords no ground for a deduction in computing limitation. *Hurro Chunder Goocho v. Gudadhur Koondoo*, 6 W. R. 183; *Tarachurn Koondoo Chowdhry v. Khehul Chunder Ghose*, 6 W. R. 269. In this last case PEACOCK, C. J., said :—" This case is very different from that of *Prannath Roy Chowdhry v. Rookea Begum*, reported in 7 Moore's Indian Appeals, page 323, for even if the pendency of the foreclosure suit would under the old law of limitation have been a good and sufficient cause for not instituting proceedings against a person holding adversely lands included in the mortgage deed, this case is governed by Act XIV of 1859, which contains no words similar to those in Section 14, Regulation III of 1793, upon which the decision of the Privy Council was founded."

In a suit by A to recover money due from B on an instalment bond, it was held that in computing limitation the time during which a previous suit brought by B against A for the cancelment of the bond had been pending, should be deducted, since the pendency of B's suit for the cancelment of the bond was a sufficient reason for A not proceeding with his claim. *Shamloll Gundee v. Choonee Koomaree Thakooranee*, 1 Hay, 444. This case, however, was decided under the old law with direct reference to the provisions of Section 14, Regulation III of 1793, which exempt from the ordinary rule of limitation all cases in which the plaintiff has been precluded by some good

and sufficient cause from obtaining redress. It may be doubted whether by the terms of the Section under notice, a deduction could now be allowed on account of such previous litigation.

A plaintiff suing for recovery of mesne profits is not entitled under this Section in computing the period within which his suit should be instituted, to deduct the time during which he has been suing the same defendant for possession of the property in respect of which the claim for mesne profits is made. See *supra*, pp. 229-231.

Under Section 14 Regulation III of 1793, the pendency of a suit in a Court *without jurisdiction* was no ground for any deduction in reckoning the period of limitation in a subsequent suit between the same parties. *Okhetoomissa v. Koochil Sirdar*, 2 W. R. 45. Under Act XIII of 1848, the pendency of a previous suit whether brought in a Court with jurisdiction or without jurisdiction, was no ground for a deduction. *Gopeenath v. Duriao Tewaree*, S. D. 1857, p. 688; *Mohendronarain Singh v. Jeymungul Singh*, S. D. 1857, p. 787; *Shamkant Bannerjee v. Gopal Lall Tagore*, 1 W. R. 328.

In a suit for possession by a purchaser at a sale in execution of a decree, instituted before Act XIV of 1859, came into operation, it was held that no time could be deducted from the period of limitation, on account of the pendency of a summary application for possession made to the Court executing the decree. *Woomachurn Mitter v. Ranee Mohamoya*, W. R. 1864, p. 130. The Court observed that the plaintiff's summary application afforded no reason for not prosecuting his claim regularly, within twelve years from the origin of his cause of action.

In computing the periods of limitation specially provided in Act X of 1859, no deduction can be made of the time during which a plaintiff has been prosecuting his claim in another Court, by applying the provisions of this Section, since Act X of 1859, is a Code complete in itself, and

where it prescribes a certain period of limitation, that period cannot be modified or altered by reference to the provisions of other laws. *Modhoooodun Paul Chowdhry v. Poulson*. 2 W. R. x. 21.

As to whether this Section can be applied to applications for execution, see the cases cited *postea*, in the remarks on Section 20.

SECTION 15.

If any person shall without his consent have been dispossessed of any immoveable property otherwise than by due course of law, may recover possession notwithstanding any title that may be set up. **Person dispossessed of immoveable property otherwise than by due course of law, may recover possession notwithstanding any title that may be set up.**

person claiming through him shall in a suit brought to recover possession of such property be entitled to recover possession thereof notwithstanding any other title that may be set up in such suit, provided that the suit be commenced within six months from the time of such dispossession. **Suit for dispossession to be brought within six months.**

But nothing in this Section shall bar the person from whom such possession shall have been so recovered, or any other person, instituting a suit to establish his title to such property and to recover possession thereof within the period limited by this Act. **Suit to establish title not to be affected.**

By Section 26, Act XXIII of 1861, it is provided that no appeal shall lie from any order or decision passed in any suit instituted under this Section, and that no review of any such order or decision shall be allowed.

This Section gives to a person who has been wrongfully deprived of possession, a right to recover possession within six months, without regard to any title, however clear, which may be set up against him. If he sues after six months have expired, the parties to the suit are left in the same condition as they would have been in under the former law, with reference to the production of proof. *Protab Chunder Burooah v. Ranees Kantaeswaree Dabea*, 2 W. R. 249 ; *Sheo Dyal Oopadhya v. Nund Kiskore Lall*, 11 W. R. 168. See to the same effect the decision of the Madras High Court in the case of *Kunhi Komapen Kurupu v. Changarachan Kandil Chembata Ambu*, 2 Mad. 313, in which it was held that this Section does not abridge any rights possessed by a plaintiff, but is intended to give him the right, if dispossessed otherwise than by due course of law, to have his possession restored without reference to the title on which he holds, or to that which the dispossessor asserts. The Court observed :—"Section 15 in no way controls Clause 12 of Section 1, inasmuch as it does not prescribe a period of limitation for suits, but, without forcing the person dispossessed to a suit, really provides a remedy other than a suit, and secures to him the position of a defendant in a suit to be brought at the option of his adversary, who, for aught that appears, may be the person entitled. It however limits the period within which the extraordinary remedy must be applied for." It was further observed by the Court that "the plain object of the Section is to discourage proceedings calculated to lead to serious breaches of the peace, and to provide against the party who has taken the law into his own hands deriving any benefit thereby, and to obviate the effect of the possible application to such cases of the English Law as laid down in *Harvey v. Bridges*, 14 M. & W. 442, to the effect that a freeholder, if entitled to eject the person in possession, may commit an indictable offence in doing so, and yet

gain all the advantages of a legal possession, and be secure against the action of the party evicted." Compare *Adoo Shaikh v. Kalichunder Sein*, 9 W. R. 602.

Where the plaintiff having been forcibly dispossessed from a house and premises by the defendant, brought an action of ejectment within six months from the time of the alleged dispossession, it was held by the Madras High Court, that this Section applied, and that the plaintiff was entitled to recover possession, notwithstanding any title that might be set up by the defendant. *Kullammal v. Kuppu Pillai*, 1 Mad. 85. Compare *Gunga Ram v. Mahmood Ali Khan*, 4 Agra, 304.

Where a Court on an application for execution of a decree for possession, and in the exercise of its judicial discretion, issued a warrant to the Sheriff, directing him to seize and deliver to the decree-holder certain specific lands, not properly coming within the description in the decree, and not, in fact, forming part of the lands for possession of which the decree was given, and the Sheriff seized and delivered in strict accordance with the directions of the writ, it was held that the dispossession thus effected, was a dispossession by due course of law within the meaning of the Section under notice. *Jadub Chenchy v. Heeraloll Shaha*, 1 Ind. Jur. n. s. 21.

A party dispossessed from immoveable property by an order passed in a summary suit brought under this Section, in instituting a regular suit to establish his title, need not ask to have the order set aside; nor ought his suit to establish title to be dismissed, merely because the boundaries set forth in his plaint differ from those set forth in the order. *Sreenath Surmah v. Bishonath Surmah*, 6 W. R. 268.

A plaintiff sued under this Section to recover possession of a plot of land, from which he alleged that he had been wrongfully dispossessed by the defendant building a hut upon it. The lower Court decided that as the land

formed part of a village, and the plaintiff had not sued for possession of the village, it could neither declare his right to the possession of the entire village, nor to the particular plot claimed. But it was held on appeal that there was no reason why the lower Court should not have tried whether the plaintiff had been dispossessed as he alleged, and whether he should not have possession. *Omar Chand Mahata v. The Nawab Nazim of Bengal*, 11 W. R. 229.

In a suit to establish title and recover possession from a person who has obtained possession under an order passed under the provisions of this Section, the whole *onus* of proof is on the plaintiff. Until he can show a title to the property in dispute, the Court cannot look into the defendant's title or disturb his possession. *Greesch Chunder Roy Chowdhry v. Moulvie Maenooddeen*, 7 W. R. 230.

A, who had been dispossessed from certain lands by virtue of a summary order passed under this Section, sued B, in whose favour the order had been made, for recovery of possession, alleging a title by deed of purchase. A was unable to prove directly the deed of purchase under which he claimed, but established by oral evidence his possession as purchaser under the alleged deed for upwards of twelve years prior to his dispossession. It was held that the proof was sufficient to throw on the defendant the *onus* of showing a better title. *Brajanath Sarma v. Ram Chandra Chowdhry*, 3 Ben. AP. 109. Compare *Bullubee Kant Bhattacharjee v. Doorjodhun Shikdar*, 7 W. R. 89, in which it was held that in a regular suit to establish title, evidence of the plaintiff's possession prior to a summary order passed under this Section by which he had been dispossessed, may be good evidence of his title, and must be considered.

It has been held in various cases that where a party ousted otherwise than by due course of law from property of which he has been in possession, fails to avail himself of the provisions of this Section by suing for recovery of

possession within six months from the date of ouster, he cannot in a suit for recovery brought more than six months after the date of ouster, by the mere proof of long anterior possession, without other proof of title, throw the *onus* of proving a better title on the defendant. *Tukroonnissa Begum v. Mogul Jan Beebee*, 7 W. R. 332, affirmed on review, 8 W. R. 370; *Ram Dutt Choudhry v. Luckhee Kooer*, 11 W. R. 447. But a contrary view was followed in the case of *Kishen Soondur Surmah v. Khajah Enaetoollah Choudhry*, 8 W. R. 386, in which it was held that in a suit to recover possession, although brought more than six months after ouster, the plaintiff's right may be established by proof of long anterior possession as against a defendant who has no title. Compare *Ayesha Beebee v. Kanhye Mollah*, 12 W. R. 146; *Shama Soonduree Dabea v. The Collector of Maldah*, 12 W. R. 164; *Koylash-nath Bhattacharjee v. Trilochun Ghose*, 12 W. R. 175.

A, otherwise than by due course of law, dispossessed B from certain lands of which B had held peaceable and undisturbed possession for more than twelve years. In summary proceedings taken under this Section, the lands were restored to B. In a regular suit by A for recovery of possession he contended that limitation should be reckoned against him only from the time when he was dispossessed under the summary proceedings. But it was held that such dispossession afforded no new cause of action. *Golam Nubbee v. Bissonath Kur*, 12 W. R. 9, cited *ante*, p. 156, and see the other cases there noticed.

Since it is declared by Section 17, that none of the provisions of this Act shall extend to any public property or right, or to any public claim, it seems doubtful whether a party who has been forcibly ousted by Government from lands which are claimed as public property, could claim to be restored to possession without reference to his title.

In the case of *Brohmo Moyee Dabea v. Burkut Sirdar*, 12 W. R. F. B. 25, it was held by a Full Bench of the

Calcutta High Court, that when a party other than the defendant has been dispossessed under a decree obtained in a suit instituted under this Section, he need not bring a regular suit to regain possession, but may apply under Section 230, Act VIII of 1859. This decision overrules the earlier case of *Gobind Ghose Mundul v. Gobind Chunder Bagdee*, 7 W. R. 171.

An order for possession passed under this Section is a summary order, and must consequently be executed within the period of one year as prescribed by Section 22 of this Act. *In re Nubokissen Mookerjee*, 11 W. R. 188.

In respect of claims to possession under Act XVI of 1838 of the Bombay Code, and under Act IV of 1840 of the Bengal Code, by parties wrongfully dispossessed, see *ante*, pp. 122-127.

SECTION 16.

Nothing in this Act contained shall be deemed to interfere with any rule or jurisdiction of any Court established by Royal Charter in refusing equitable relief, on the ground of acquiescence or otherwise, to any person whose right to bring a suit may not be barred by virtue of this Act.

Act not to interfere with equitable jurisdiction of Supreme Courts.

In the Revised Draft Act submitted to the Legislature by the Indian Law Commissioners with their Report dated the 1st October, 1842, this Section stood as follows:—
 “Provided that nothing in this Act contained shall be deemed to interfere with any rule or jurisdiction of any Court in refusing equitable relief, on the ground of acquiescence or otherwise, to any person whose right to bring a suit may not be barred by virtue of this Act.”
 With reference to this proviso the Commissioners observe

in their Report:—"We have introduced a provision corresponding with Section 27 of the Statute 3 & 4, W. IV. c. 27, to preserve any rule or jurisdiction of any Court by which equitable relief may be refused on the ground of acquiescence, or otherwise, in the party seeking it. This provision seems to be necessary with respect to Her Majesty's Courts; while it may be applicable also in cases falling under the jurisdiction of the Company's Courts. For example in the case of a person suing in one of the Company's Courts to recover land of which, through fraud or mistake, he had been led to make a conveyance to another, praying that the conveyance may be considered void on the ground of such fraud or error, if it should appear that he had been for some time aware of the alleged fraud or error, and that he had, notwithstanding, by his conduct acquiesced in the adverse possession, as by encouraging the possessor to build upon the land, or otherwise to lay out money in improving it, we conceive that the Court would think itself justified in refusing the remedy and relief sought by him, although not barred by prescription, on the ground that he had by overt acts given an after-confirmation to the deed which his plaint impugned."

As the Section was finally enacted, it formerly had reference only to suits in the late Supreme Courts, and is now applicable only to suits brought before High Courts in the exercise of their ordinary original civil jurisdiction.

Land situated in Calcutta was sold by the Sheriff in execution of a decree of the late Supreme Court. The purchaser lay by for eleven years, during which time he allowed another person to occupy the land and afterwards to sell it. On his suing for possession, it was held that he was estopped by his conduct from questioning the rights of the defendant who was a *bonâ fide* purchaser without notice. *Mohesh Chunder Chatterjee v. Issur Chunder Chatterjee*, 1 Ind. Jur. N. S. 266.

In the case of *Rama Rau v. Raja Rau*, 2 Mad. 114, it was observed by the Madras High Court, that "the equitable doctrine of laches and acquiescence is not applicable to suits in the Mofussil, for which a period of limitation is provided by the Limitation Act; and that lapse of time as a defence to such suits can only be relied upon, when under the Act it has become a bar." Compare the case of *Nilatatchi v. Venkatachala Mudali*, 1 Mad. 131, in which it was held that there is no such doctrine in this country as that acquiescence is a binding presumption of law after the lapse of several years. See also the cases of *Peddamuthalaty v. N. Timma Reddy*, 2 Mad. 270, and *Rajan v. Basuva Chetti*, 2 Mad. 428.

It may, however, be safely asserted that evidence of such direct acquiescence as that instanced in the illustration of the Indian Law Commissioners above cited, although it could not be taken to be a legal bar in a suit instituted in a Court not established by Royal Charter, so as to render the trial of the suit unnecessary, would afford the strongest evidence against the genuine character of the plaintiff's claim.

Where A, after attaining full age, allowed his mother to give him out to the world as a minor, and, as his guardian, to mortgage his ancestral property, and permitted the mortgagee to retain possession for five years; it was held that he could not afterwards turn round and repudiate arrangements which had been made for his benefit, and with his knowledge, and for which an innocent party had given valuable consideration. *Purmessur Ojha v. Goolbee*, 11 W. R. 446.

A zemindar sued to set aside a putnee pottah under which the defendant had been holding lands for many years, and for recovery of possession of these lands, alleging that the pottah, which had been granted by his mother and guardian during his minority, was not binding upon him. It appeared that after attaining majority, the plaintiff

by certain proceedings in the Collector's Court—in which however he had reserved his right to assert that he was not bound by the pottah granted by his mother,—had sought and recovered rent from the defendant as putneedar,—and had subsequently allowed the defendant to remain in undisturbed enjoyment of the putnee for a period of six years, but without receiving rent from him. It was held by the lower Courts that the facts disclosed constituted no bar to the plaintiff's right to recover. But it was held by a Division Bench of the High Court on appeal, that as the plaintiff had by his proceedings before the Collector, not only compelled the defendant to pay him rent under the pottah in question, but had moreover disclosed the fact that he then knew that he possessed the right to question the validity of the pottah, and had yet forborne to take any steps to set it aside until six years afterwards, he could not in the face of such *laches*, be allowed in a Court of Equity to say that he had not ratified the pottah, of which he had so long, and with a full knowledge of facts, permitted the defendant to have enjoyment. *Sreekant Nath v. Ishan Chunder Mo-joomdar*, 9 W. R. 110.

It has been held that where A stands by and allows B to erect a *pucka* building on his land, it must be taken that A has acquiesced in B's act, and consequently that he is not entitled to sue for the removal or demolition of the building, but only for damages, or for the rent of the land on which the building stands. *Hullodhur Mookerjee v. Hurrochunder Mookerjee*, W. R. 1864, p. 166. Where a landlord stands by and allows a tenant without any objection to erect *pucka* buildings upon his land, notwithstanding a stipulation in the *kabooleut* restraining the tenant from so doing, he is precluded by his conduct from turning the tenant out of possession. *Banee Madhub Bannerjee v. Joykishen Mookerjee*. 12 W. R. 495. Similarly in the case of *Radhanath Bannerjee v. Joykissen*

Mookerjee, 1 W. R. 288, it was ruled that a plaintiff who had not opposed the making of a road through his lands until its completion, was not entitled to sue to have it closed. But in the case of *Ramdhone Bhutta-charjee v. Huro Soonduree Dabea*, 7 W. R. 276, it was held that if A constructs a road across B's lands, B can sue at any time within the ordinary period of limitation for its removal; and that no consent can be inferred on the part of B to the construction of the road, from the fact that he did not bring his suit immediately upon its commencement, or completion. Compare *Ram Comul Ghose v. Brojonath Mojoomdar*, W. R. 1864, p. 258.

SECTION 17.

This Act shall not extend to any public property or right, nor to any suits for the recovery of the public revenue or for any public claim whatever, but such suits shall continue to be governed by the laws or rules of limitation now in force.

Act not to extend to public property, nor to suits for the recovery of public claims.

IF it be desirable that a different rule of limitation should be applied to suits in respect of public rights and property, from that which governs private claims, it is to be regretted that in framing this Act, the Legislature did not lay down uniform rules of limitation applicable throughout the British territories in India to all claims of a public nature. The present state of the law is far from being satisfactory.

No special provisions in respect of the limitation applicable to public claims by the Government are contained in the Codes of Madras and Bombay. In these Presid-

encies therefore, it may be inferred that such suits are governed by the same general rules of limitation which before the passing of Act XIV of 1859, would have applied to private claims. In the Bengal Presidency the law of limitation formerly applicable to public claims by the Government was contained in Regulation II of 1805, wherein it was declared that the limitation of twelve years prescribed by Section 14, Regulation III of 1793, should not apply to suits for the recovery of any public right or claim whatever instituted by or on behalf of Government, but that in all such cases the period of limitation should be that of sixty years from the origin of the cause of action.

But Act VIII of 1868, repeals Section 14, Regulation III of 1793, and also repeals Regulation II of 1805, without making any reference whatever to the terms of Section 17, Act XIV of 1859, and according to the ordinary rule of construction in respect to the repeal of Statutes, these repealed Regulations now stand to all effects and purposes in the same position as if they never had existed. In this view there is no longer any law of limitation in force in the Bengal Presidency applicable to claims of a public nature.

It may possibly, however, admit of being argued that by the express terms of Section 17, Act XIV of 1859, which declare that suits for the recovery of public rights &c., "shall continue to be governed by the laws or rules of limitation now in force," the provisions of Regulation II of 1805, were made a part of Act XIV of 1859, in the same manner as if they had been expressly re-enacted by it, and that standing as a part of Act XIV of 1859, they cannot be taken to be repealed, in that connection, by Act VIII of 1868, in which no express reference is made to Act XIV of 1859.

The following cases may be referred to as illustrating the law applicable in Bengal to public claims prior to the

passing of Act VIII of 1868. No case has as yet arisen in which the effect to be given to that Act in repealing Regulation II of 1805, has been determined.

In the case of the *Collector of Rungpore v. Prossonno Coommar Tagore*, 5 W. R. 115, it appeared that the Government, had taken possession summarily by its Revenue Officers of the fisheries of the defendant in certain navigable rivers, and that the defendant had thereupon sued for recovery of possession, and had obtained a decision in his favour. The Government then brought a regular suit to establish its right and title to the fisheries in dispute, which was dismissed by the Court of first instance on the ground that the Government had not been in possession within sixty years before suit. Against this decision the Government appealed, urging that the suit was not barred, since the cause of action only arose at the time when the defendant, after being summarily ejected, instituted his suit for possession; and since the defendant had failed to establish that the fisheries in question formed part of his estate at the time of the permanent settlement. But the High Court held that the claim was out of time under Section 2, Regulation II of 1805. "That law" it was observed, "gives the Government as the representative of the Sovereign, a period of sixty years within which to sue for rights to public revenue such as these now claimed. The law gives no extension of that period of sixty years. It allows no exception, so as to fix the period from which limitation shall be held to run, at the time when the attention of Government may first be called to its rights. Neither that law, nor any other law provides remedies for the Government, or others, who sleep over, or do not give attention to their own rights in due time, nor does it fix limitation from the date of suit by a party considering himself illegally ejected by Government from long previous possession. It is admitted that the Government is not in a position to prove its own possession before the

time when it summarily ejected the defendant, but it is pressed upon us, that it is for the defendant to prove that he has been in adverse possession for sixty years, before he can succeed in his plea that the plaintiff is barred by limitation. We do not concur in this view. When a defendant pleads in bar that the plaintiff cannot under the law of limitation be heard in a cause, because he has not been in possession within the period prescribed by law, it is for the plaintiff to remove that bar by showing possession within such period as the law prescribes. The Government in this case does not show, or attempt to show its possession in this way. Were we to admit the plea that the cause of action arose only when the defendant, after his summary ejectment, first sued the Government, it would be equivalent to holding that the plea of limitation might always be successfully urged by a party committing an act of illegal ejectment, and then pleading that it is only when the party illegally ejected sues for his remedy for the loss of his long previous possession, that the cause of action arises, and that all previous adverse possession of the defendant ought to go for nothing. This we are not at all prepared to hold."

In the year 1861, the Government sued certain ghatwals for the possession of lands of which it was alleged that they had taken fraudulent and dishonest possession. The defendants pleaded limitation under the provisions of Regulation II of 1805. It appeared on the trial of the suit that in the year 1847, the disputed lands had been assigned to the defendants under an award passed by the Magistrate under Act IV of 1840, in which award it was declared that the defendants had then been in possession for more than thirty years. Looking at this long possession, the Court of first instance gave judgment for the defendants. But the lower appellate Court, considering it to be established that, in respect of title, the greater part of the lands properly belonged to the Government, held that as

the defendants had not proved their possession for sixty years, the plaintiff's suit must be decreed. On appeal to the High Court it was ruled, that the *onus* had been wrongly imposed by the lower appellate Court; that considering the very long possession of the defendants, it was not enough that they had failed to prove their possession for upwards of sixty years, but that to entitle the Government to a decree, it must show possession, either direct, or through subordinate ghatwals, within sixty years prior to the institution of the suit. The case was accordingly remanded for a distinct finding, as to whether or not the Government had been in possession within sixty years before action brought. *The Government v. Bromannund Gossain*, 5 W. R. 136. Compare *Bagram v. The Collector of Bhullooah*, W. R. 1864, p. 243.

The right of Government under Section 309, Act VIII of 1859, to the value of the stamp duty which has been remitted in respect of a pauper suit, has been held to be a public right within the meaning of this Section. *The Government v. Shamee Mahomed*, 11 W. R. 67. But a suit for the recovery of costs incurred by the late East India Company in the character of agents—under the Statute 3 & 4 Will. IV. c. 41, s. 22, and the Order in Council of the 4th September, 1833,—for prosecuting a dormant appeal, was held by the Privy Council not to be a claim for a 'public right' within the meaning of Section 2, Regulation II of 1805, and consequently not to be governed by the limitation of sixty years. *The Government of Bengal v. Shuruffutoonnissa*, 8 Moore's I. A. 225.

Where the Government claims possession of immoveable property on the failure of natural heirs, the period within which it must sue is to be reckoned from the time when the failure of heirs or reversioners became apparent. In such a suit brought in Bengal against parties who have no legal title, the defendants must be able to plead sixty years' possession in order to bar the claim. *The Government v. Pursun Lal*, W. R. 1864, p. 102.

Under Regulation XIX of 1810, it is declared to be the duty of the Government to provide that endowments for pious and beneficial purposes should be applied according to their real intention. Where a plaintiff upon his appointment as *mutwallie*, or superintendent of a religious endowment, or *wuqf*, sued to recover possession of property belonging to the endowment, it was held by the Privy Council that as the *mutwallie* is to be regarded as the agent of Government for performing the acknowledged duty of Government of protecting the endowment from misapplication, the case as a suit in respect of a public right, fell within the provisions of Section 2, Regulation II of 1805. *Jewun Doss Sahoo v. Shah Kubeerooddeen*, 6 W. R. P. C. 3. It was further observed in this case that the plaintiff who was neither heir nor personal representative of his father in respect of *wuqf* property had no right of action against the defendant, until he was appointed *mutwallie*, and that the defendant could acquire no right against the Government whose procurator the plaintiff was, at least until twelve years had elapsed from the date of his appointment. It has been held however that the above remarks are only applicable to the case of a plaintiff who is neither heir nor representative of his father in regard to the property sued for, and who derives his right to property of the nature of *wuqf*, from an express personal appointment. *The Nawab Nazim v. Kaleenath Raee*, S. D. 1849, p. 75. Compare *Reasut Ali v. Abbott*, 12 W. R. 132, in which the ordinary law of limitation was applied by the Court.

Where A, as lessee under a Government settlement, claimed certain lands of which B had held possession for more than twelve years, it was decided that the mere fact of A claiming as a lessee under Government did not entitle him to the extended limitation applicable to a claim for a public right, and that his case was governed by Clause 12 of Section 1. *Assoo Meah v. Rajoo Meah*, 10 W. R. 76.

Compare *The Collector of the 24-Pergunnahs v. Gunga Gobind Mundul*, 7 W. R. P. C. 21.

The extended period of sixty years given to the Government under the old laws of limitation for the prosecution of its claims, had reference only to the hearing, trying, and determining of these claims, and not to the enforcement of rights already determined. In respect of proceedings in execution of decrees, the same rules applied to the Government as to private individuals, and an application for execution was barred, if not made within twelve years from the date of the decree, unless good and sufficient cause was shewn for the delay. *The Government v. Hajee Syed Bahadoor Alee*, S. D. 1854, p. 426.

SECTION 18.

All suits that may be now pending or that shall be instituted within the period of two years from the date of the passing of this Act shall be tried and determined as if this Act had not been passed; but all suits to which the provisions of this Act are applicable that shall be instituted after the expiration of the said period shall be governed by this Act and no other law of limitation, any Statute, Act, or Regulation now in force notwithstanding.

THE operation of Act XIV of 1859, was suspended by Acts XI and XXXII of 1861, and by Act XIV of 1862.* Act XI of 1861 extended the time within which suits

* These Acts will be found printed in Appendix B.

might be brought without being affected by the provisions of Act XIV of 1859, until the first day of January, 1862. Suits instituted since that date are governed by the provisions of Act XIV of 1859, which had from that time as full operation as if Act XI of 1861, had never been passed. *Mohidin Sahib v. Khader Sahib*, 2 Mad. 42. That portion however of Clause 8, Section 1, of Act XIV of 1859, which relates to suits for the price of articles sold by retail, was postponed in its operation by Act XXXII of 1861, to the first July, 1862, and again by Act XIV of 1862, to the first January, 1865. See the case of *Buldeo Doss Johurry v. Sreenath Sein*, 1 Ind. Jur. 114.

SECTION 19.

No proceeding shall be taken to enforce any judgment, decree, or order of any Court established by Royal Charter, but within twelve years next after a present right to enforce the same shall have accrued to some persons capable of releasing the same, unless in the meantime such judgment, decree, or order shall have been duly revived or some part of the principal money secured by such judgment, decree, or order, or some interest thereon shall have been paid, or some acknowledgment of the right thereto shall have been given in writing signed by the person by whom the same shall be payable or his agent to the person entitled thereto or his agent; and in any such case no proceeding shall be brought to enforce the said judgment, decree, or order, but within twelve

Proceeding for enforcing judgments, &c., of Supreme Courts to be taken within twelve years.

years after such revivor, payment, or acknowledgment, or the latest of such revivors, payments, or acknowledgments as the case may be: provided

Proviso as to judgments that for three years next
now in force.

after the passing of this Act, every judgment, decree, and order which may be in force at the date of the passing of this Act shall be governed by the law now in force, anything therein contained notwithstanding.

AN application was made on the 6th January, 1863, for execution of a decree of the Privy Council passed on the 29th July, 1859. The application was refused by the Court in which it was made, as not made in accordance with the provisions of Section 20, Act XIV of 1859, within three years from the date of the decree. On appeal, it was urged by the decree-holder that as the Privy Council is a Court established by Royal Charter, execution of its decrees is governed by the provisions of Section 19, and not by those of Section 20 of Act XIV of 1859. But it was held by LOCH and GLOVER, JJ., that Section 19 of Act XIV, is applicable only to the Courts *in this country* established by Royal Charter; that the decrees of the Privy Council in appeals preferred from judgments passed by the late Sudder Court, were and are executed under Section 1, Act XXV of 1852, by the Court which originally tried the case; that as decrees of such Court they are subject to all the rules of such Court; and, consequently, that the application of the decree-holder had been properly held to fall under the provisions of Section 20 of the Limitation Act. *Wise v. Jugobundoo Baboo*, 4 W. R. MIS. 10.

But the authority of this decision has been destroyed by the later ruling of the Full Bench, in the case of *Anundo Moyee Dassee v. Poorno Chunder Roy*, 6 W. R. MIS. 69,

in which it was held that the Legislature of this country has no power to limit the time for executing the decrees of the Privy Council ; that the words of Section 1, Act XXV of 1852, have reference merely to procedure and not to limitation ; and that neither Section 19, nor Section 20 of Act XIV of 1859, have any application to the execution of Privy Council decrees.

In the case of *Tarucknath Mookerjee v. Maharajah Dheeraj Mahatab Chand Bahadoor*, 6 W. R. MIS. 94, it was held that as a decree of the Calcutta High Court on the appellate side, is a decree of a Court established by Royal Charter, the period to be allowed for its execution is that of twelve years as provided by this Section, and not that of three years as provided by Sections 20 and 21. Compare *Ishan Chunder Chowdhry v. Jugodishuree Choudhrai*, 8 W. R. 267 ; *Kishen Kinkur Ghose v. Borodakant Roy*, 8 W. R. 470.

But where the decree of the High Court simply confirms the order of the Court below, it has been held that the decree to be executed is substantially the decree of the Court from whence the appeal came, excepting in so far as the High Court may have awarded the costs of the appeal, and that, in such a case, the limitation of twelve years under this Section will apply only to that part of the order of the High Court which relates to costs. *Tufuzsul Hossein Khan v. Bahadoor Singh*, 11 W. R. 205. It may, however, be thought that when the decree of an inferior Court is affirmed on appeal by a High Court, the entire decree should be deemed a decree of that Court. See *Bapurav Krishna v. Madharav Ramrav*, 5 Bom. A. C. 214 ; *Chunder Sikhur Bhuttacharjee v. Biprodoss Gossain*, 7 W. R. 521.

This Section is, of course, inapplicable to decrees of the late Sudder Courts, since these were not Courts established by Royal Charter. *Kasheenath Mundul v. Thakoor Doss Gossain*, 12 W. R. 73.

In the case of *Jussorut Khan v. Kanyeloll Dey*, reported in the "Indian Daily News" of the 13th August 1866, it was held by PHEAR, J., that the Small Cause Courts of the Presidency towns—constituted under Act IX of 1850, in which it is declared that "the several Courts of Commissioners and of Requests now holden under the authority of the Charter of Justice of King George the Second, shall be holden according to the provisions of this Act,"—are not, within the meaning of this Section, Courts established by Royal Charter.

In the case of *Coultrup v. Smith*, 1 Mad. 204, it was held that the judgments of the Judges of the late Supreme Courts, sitting, under the provisions of Act IX of 1850, as Judges of Small Cause Courts, are judgments of a Court established by Royal Charter, and that the execution of such judgments falls to be regulated by the terms of the Section under notice. The Court observed that under the provisions of Sections 11 and 12 of Act IX of 1850, the Supreme Court Judges were enabled to exercise the powers conferred by the Act upon the Judges of Small Cause Courts, but that in doing so, they exercised such powers as Judges of the Supreme Court. The correctness of this view may, however, be thought open to doubt, since it may be said that as the Judges of the Supreme Courts sitting as Judges of Courts of Small Causes can exercise no powers other than those given by the Act to Small Cause Court Judges, the execution of the judgments of both classes of Judges would seem to be properly governed by the same rules. If therefore judgments of ordinary Judges of Small Cause Courts must be executed under the provisions of Section 20 of the Limitation Act, it is conceived that the same provisions would apply to the judgments of Supreme Court Judges sitting as Small Cause Court Judges.

SECTION 20.

No process of execution shall issue from any Court not established by Royal Charter to enforce any judgment, decree, or order of such Court, unless some proceeding shall have been taken to enforce such judgment, decree, or order, or to keep the same in force within three years next preceding the application for such execution.

ACCORDING to the practice prevailing in Bengal before Act XIV of 1859, came into operation, a decree not carried into execution within one year from the time of its being passed, might be executed on application being made for that purpose within twelve years from the date of its passing, after the opposite party had been personally called upon to show cause why it should not be carried into effect. The date of passing the decree was held to mean the date of the decree in the Court of first instance, in cases in which there had been no appeal, and the date of the decree in the Court of ultimate appeal, in cases in which there had been an appeal. An application made beyond the period of twelve years could not be entertained, unless the applicant could satisfy the Court that there had been good and sufficient cause for the delay, as, for example, if he could prove that he had demanded the money or matter in question, and that the defendant had admitted the truth of the demand, or promised to pay the money; or could show that he had directly preferred his claim to the matter in dispute to a Court of competent jurisdiction to try the demand, and could assign satisfactory reasons to the Court why he did not proceed in the suit; or unless

he could prove that either from minority, or other good and sufficient cause, he had been precluded from obtaining redress. See *Macpherson's Civil Procedure* 4th ed. pp. 318, 319. These rules as to limitation in reference to the execution of decrees, appear to have been laid down by analogy to the twelve years rule of limitation in respect of suits, and although they did not form part of the law enacted by legislative authority, yet they were sanctioned by the long and uniform practice of the tribunals.

The period of twelve years formerly allowed to a decree-holder within which to execute his decree, is reduced, under the provisions of the Section under notice, to a period of three years, in respect of all decrees not being decrees of Courts established by Royal Charter.

It has been held that under Act XIV of 1859,—as under the old rules,—the period of three years is to be reckoned in cases in which there has been an appeal, from the date of the final judgment, decree, or order of the Appellate Court. To this effect see the case of *Sheikh Fuzl Imam v. Doolun Singh*, 5 W. R. MIS. 6, in which the facts were as follows:—In the year 1860, the late Sudder Court had affirmed the decision of a lower Court in part, but had remanded the case for further investigation on certain points. The investigation was made, and a decree was passed by the lower Court, which was upheld by the High Court in the year 1862. The decree-holder having applied, in 1865, for execution of his decree, the application was refused as not made within three years from the date of the original decree. But it was held, on appeal, by the High Court that this decision was erroneous, and that limitation must be taken to run from the date of the last judgment by which the whole decree became final. It was observed that the plaintiff could not be expected to execute, and in fact could not execute an incomplete decree, and could take no steps to obtain execution, until the whole of the questions in dispute were adjudicated upon.

A plaintiff, having obtained a decree in his favour for less than his demand, appealed to the Zillah Judge, by whom his entire claim was disallowed on the ground of limitation. On special appeal to the late Sudder Court the case was remanded for trial on the merits, and on remand was dismissed by the Zillah Judge, whose order was confirmed on a second special appeal to the Sudder Court. A subsequent application to that Court for review of judgment was rejected. The defendant having applied for execution for the costs which had been awarded him in these several appeals, it was held by the Zillah Judge that in respect of the first four decrees, the application was barred, as made more than three years from the date of these decrees. But it was held by the High Court on appeal, that the application was in time. It was observed :—"The defendant had every reason to delay taking out execution for his original costs. By the machinations of the plaintiff, the case was kept continually before the Courts; and until a final decision was arrived at, the defendant had no means of knowing whether, after all, the costs might not be payable *by* him instead of *to* him. In all analogous cases the 'judgment' is understood to mean the 'final judgment,' and we think that it should be so construed in this case, and that the period of limitation should be reckoned from the time when the matter in dispute was finally settled, and the defendant became rightfully and definitively entitled to costs."—*Singh v. Lalla Kalee Churn*, 3 W. R. MIS. 21. This decision was followed in the case of *Hurree Bungsho Bannerjee v. Ramesur Bannerjee*, 6 W. R. MIS. 38. In this case a decreeholder, on the 1st May, 1865, applied for execution of a decree obtained by him on the 20th August, 1861, which decree having been appealed against, had been confirmed by the late Sudder Court on the 5th May, 1862. The Court in which the application was made, rejected it, on the ground that execution was barred by the terms of the

Section under notice, inasmuch as more than three years had elapsed since the date of the original decree. On appeal to the High Court it was contended that the three years should be reckoned, not from the date of the original decree, but from the date of the order of the Sudder Court dismissing the appeal, since although a decree-holder is bound to execute within three years a decree which is not under appeal and is final, he ought not to be compelled to execute a decree which has been appealed from, and which may possibly be reversed, until the appeal is decided. The Court held that the three years were to be calculated from the date on which the decree became final, and the relative positions of the parties as decree-holders and judgment-debtors were definitively settled. See also the remarks of PEACOCK, C. J., in the case of *Kalichurn Roy Chowdhry v. Gyanchunder Roy Chowdhry*, 7 W. R. 48.

But the view followed in the case of *Bissambhur Panjah v. Chowdhry Junmenjoy Mullick*, 5 W. R. MIS. 45, is not consistent with the decisions in the cases above cited, since it was held in this case that the three years limitation prescribed by this Section, ran from the date of the original decree, and not from the date when an application for review was rejected. The Court said :—"It is argued that the words 'proceeding to keep the decree in force' used in Section 20, Act XIV of 1859, must include the opposing of the judgment-debtor, not only in appeal, but also by voluntarily, or otherwise, appearing to watch an application for review, and that, therefore, the final orders in such a summary proceeding give a new start. We are not prepared to hold that the words 'proceedings to enforce execution, or to keep a decree in force,' were meant to include the appearance of a decree-holder to watch or oppose his adversary on appeal, and much less, as here, on an application for review only. The rejection of an application for review is no decree or final adjudication of a

suit." Compare *Ram Ruttun Bannerjee v. Ameeroolmolk Bunwaree Gobind Bahadoor*, 6 W. R. MIS. 95.

The conflict of opinion in the above cases, led in the case of *Chunder Sikhur Bhattacharjee v. Biprodoss Gossain*, 7 W. R. 521, to a reference to the Full Bench, as to whether, where a plaintiff obtains a decree, and the defendant applies for a review of judgment, which application is eventually refused, the three years limitation provided by this Section is to be calculated from the date of the original decree, or from the date on which the application for review was rejected. In delivering the judgment of the Court on this reference PEACOCK, C. J., said :—" We think that the words 'any judgment, decree, or order' used in Section 20, Act XIV of 1859, must mean a judgment, decree, or order which the person in whose favour it is given, is at liberty to enforce by execution, and that it would not be less a judgment, decree, or order of the Court, because an application to review it, or a petition of appeal against it, had been preferred by the opposite party. If, in the case of an appeal, a new judgment of affirmance of the former decree should be given, then a new judgment would have to be executed, and the period for applying for execution would commence from the time of the new judgment of affirmance. But if the appeal were dismissed for default, there would be no new judgment, and the judgment of the lower Court would be the judgment to be enforced. The next question is, whether the words 'unless some proceeding shall have been taken to enforce such judgment, decree, or order, or to keep the same in force within three years next preceding the application for such execution,' would include an opposition by the person in whose favour the judgment had been given, to an application for review, or to a petition for appeal. We think that a mere application for a review, or a petition of appeal by the person against whom the judgment was given, would not be an act done by the

person in whose favour the judgment was given for the purpose of keeping the same in force. It would be an act done by the opposite party to destroy it, and not done by the person in whose favour it was given to keep it in force. But if, upon the application for review, or the petition of appeal, the person in whose favour the original decree was given appears in person or by vakeel (whether voluntarily or upon service of notice) to oppose the application, and files a vakalutnamah, or does anything for the purpose of preventing the appellate Court, or the Court of review, from setting the judgment aside ; we think that within the fair interpretation of the words, such act, being an act of the person in whose favour the judgment has been given for the purpose of preventing it from being set aside, is an act done for the purpose of keeping the judgment in force. If the party is successful in preventing the judgment from being set aside, and does, in fact, keep the judgment in force, and afterwards applies to execute it, his application is in time, if made within three years from the date of the last act which he did to keep the judgment in force, or to prevent it from being set aside."

A suit brought in a Court of Small Causes was dismissed with costs on the 16th May, 1863. Two applications made by the plaintiff for a new trial were successively rejected. A third application of the same character, having been referred by the Judge for the opinion of the High Court, was also rejected on the 16th June 1865. In December, 1867, the defendant applied for execution of his decree for costs. The plaintiff pleaded that the application was out of time. But it was held that as on the various applications for a new trial the defendant had appeared to oppose, his opposition must be considered to have been an act for keeping the decree in force, and, consequently, in accordance with the decision of the Full Bench in the case last cited, that his application for execution was in

time. *Nuzimooddeen v. Pran Kisto Bannerjee*, 9 W. R. 398. Compare *Grish Chunder Bannerjee v. Bhanoo Motee Chowdhraïn*, 11 W. R. 329; *Buldeo v. Guj Singh*, 1 All. 161.

A different view as to the meaning of the Section has been taken by the Madras High Court, in the case of *Virasramy Mudali v. Mannomany Ammal*, 4 Mad. 32, in which after referring to the Calcutta Full Bench decision in the case of *Chunder Sikhur Bhuttacharjee*, the Court said :—"The Section requires that 'some proceeding' shall have been taken within three years to enforce the decree or keep the same in force, and bearing in mind that an appeal does not of itself operate as a stay of execution, and that, pending an appeal, a decree-holder is at liberty to take any proceedings which the law allows for enforcing or keeping in force his decree, we think that his merely resisting an application to set aside the decree cannot be regarded as such a proceeding. It seems to us that the proceeding intended by the Section is a proceeding in which the decree-holder is the actor, and a proceeding taken *bonâ fide* for the purpose of obtaining execution, or of preventing the effect of lapse of time."

The following cases will illustrate some further questions which have arisen as to the meaning of the word 'proceeding' as used in this Section. On a reference to the Full Bench of the Calcutta High Court in the case of *Degun Singh v. Ram Sahay Singh*, 6 W. R. MIS. 98, it was held that any *bonâ fide* application made to a Court by a decree-holder with the view of obtaining execution of a decree of such Court, and any substantial act done in furtherance of such application, either by the decree-holder himself, or by the Court put in motion by him, is a proceeding within the meaning of the Section; the words *bonâ fide* being understood to indicate a real desire and intention on the part of the decree-holder to obtain execution of his decree.

It has, however, been held by the Madras High Court

that in order to keep a decree alive, it is not necessary, under this Section, that the application for execution should be made with the intention of enforcing the decree *at that time*, the Section itself recognizing a distinction between proceedings to enforce the decree and proceedings to keep it in force. *Kondaraju Venkata Subhaya v. Ramakrishnamma*, 4 Mad. 75. It was observed in this case that there is nothing in the Section about *bona fides*, and that its terms seem to show that the Legislature did not mean to compel a decree-holder to proceed *bona fide* to enforce his decree within three years, under the penalty of being altogether barred by lapse of time.

So likewise in the case of *Narada Chetty v. Vaiyapury Mudali*, 4 Mad. 151, it was held by the Madras High Court that the issuing of process of execution is clearly not necessary to save the bar of limitation provided under this Section; the right to take a proceeding simply for the purpose of keeping the decree in force being plainly recognized by the Section, and given the same effect as process to enforce the liability under it.

To a somewhat similar effect it has been held by the Agra High Court that the words of this Section which require that 'some proceeding' shall have been taken to enforce the decree or to keep the same in force, contemplate that some application should be made to the Court by the execution-creditor, but do not necessarily require that proper warrants for the execution of the decree should issue against the property or person of the debtor; since in many cases neither can be found, and in others, although the debtor might be arrested and imprisoned in execution at his creditor's expense, there would be no property forthcoming to satisfy the decree. In such cases, the decree-holder is not bound to ask the Court to issue process of execution. It is enough if he has taken such steps to set the Court in motion as are sufficient to indicate on his part a desire to execute the decree, and if the Court

has proceeded in accordance with his request, he is not required to prosecute to a termination the proceedings which he may have commenced, but may withdraw when it appears useless to prosecute them further. *Bahadoor Singh v. Kullyan Singh*, 1 Agra, F. B. 163.

The expressions used by the Calcutta High Court in deciding various cases arising under this Section, might seem to indicate that these cases were decided with reference to the circumstance of former proceedings in execution having been *effectual* and *fructuous* on the one hand, or *ineffectual* and *abortive* on the other. But the ruling of the Full Bench in the case of *Degun Singh v. Ram Sahay Singh*, above cited, must be taken to establish that any honest attempt made within time by a decree-holder to obtain execution of his decree, is, even where unsuccessful, a proceeding which will keep the decree alive. It was observed by the Court in this case that the words 'some proceeding,' as employed in this Section, "include applications for execution *bonâ fide* made under Section 207 of the Code of Civil Procedure, and all acts done either by the Court, or by an Officer of the Court, or *bonâ fide* by the applicant, for enforcing the decree, or keeping it in force. For instance, if a decree, or order of Court were more than one year old, an application made to the Court for execution, would be a proceeding to enforce the decree, although it would be necessary to issue a notice to the judgment-debtor, or his representative, to show cause why execution should not issue against him. So also the service of such notice, if made *bonâ fide*, so also the issue of process of execution, or the execution of such process. These would all be proceedings, but no proceeding would be effectual within the meaning of Section 20, unless it were *bonâ fide*." Compare, *Kalikishore Bose v. Prossonno Chunder Roy*, 10 W. R. 248.

Those of the following cases in which it has been held that former proceedings in execution were insufficient to

keep a decree in force, can safely be accepted as precedents, only in so far as it may seem to have been the opinion of the Court that in these cases the former proceedings were not taken by the decree-holder with a real desire and intention to obtain satisfaction of his claim.

Where a decree-holder had within three years next before an application for execution of his decree, contested and settled by compromise an appeal by an intervenor against the decree, which if sustained would have had the effect of setting aside the decree for want of jurisdiction, it was held by the Calcutta High Court that this was a proceeding within the meaning of the Section, and saved the application, although made more than three years from the date of the decree. *Jamal Beebee v. Syud Khan*, 5 W. R. MIS. 19.

Where a party who had obtained a decree in 1845, 'prayed annually' for execution, but took no further steps to have his decree executed, it was held that his proceedings were merely colourable, and indicated no *bonâ fide* intention of obtaining satisfaction of his decree. *Motee Singh v. Tabbur Singh*, 8 W. R. 306; but see the decision of this case on review, 9 W. R. 443.

A decree-holder applied for execution of his decree by the sale of certain property which he alleged to be the property of his judgment-debtor. The property having been claimed by a third party, the decree-holder was summoned by the Court to give evidence, and on his failure to attend, the case was struck off. The decree-holder, subsequently, within three years from the time when his former application was struck off, but more than three years from the date of decree, applied a second time for execution. The Judge dismissed the application as not made within time, and his order was confirmed by the High Court on appeal. The Court observed:—"It is clear that beyond filing a petition, the decree-holder did nothing. We think that the presentation of a petition with-

out any further steps on the part of a decree-holder, is insufficient to keep alive his right to execute his decree." *Shaikh Idoo v. Shaikh Besharoola*, 2 W. R. MIS. 10. To the same effect see *Taranath Roy v. Rajbullub Bhunj*, 3 W. R. MIS. 2; *Rancee Shurut Soonduree Dabea v. Chunder Coomar Roy*, 6 W. R. MIS. 37.

The mere striking off the file an application for execution, is not a proceeding to enforce a decree. *Maharajah Dheraj Mahatab Chand Bahadoor v. Deeno Moyee Dabea*, 6 W. R. MIS. 60; *Maharajah Dheraj Mahatab Chand Bahadoor v. Buloram Singh*, 6 W. R. MIS. 63; *Tarinee Churn Gangooly v. Tiluck Chunder Ghose*, 6 W. R. MIS. 64; *Dooar Bharatee v. Muddun Bhukut*, 8 W. R. 320.

Where an application for execution was disallowed, and an appeal by the decree-holder against the order of the Court was struck off the file for default, it was held that the appeal could not give the decree-holder a fresh point from which to start in reckoning limitation when he again sought to execute his decree. *Gour Chunder Saha v. Gour Mohun Ghose*, 5 W. R. MIS. 11.

An order of a Court restoring an execution case to the file, is no guarantee of the *bona fides* of the decree-holder, and if it be proceeded with no further, will be no better protection against limitation than the petition on which it was passed. *Rajah Sutto Surun Ghosal v. Bhyrub Chunder Bromho*, 9 W. R. 565, confirmed on appeal, 11 W. R. 80. But compare *Bharotee Dabea v. Kurroona Moyee Dossee*, 10 W. R. 229.

Where the party applying for execution fails to deposit *tullubana*, his neglect is evidence to be taken into consideration in deciding whether the application was merely colourable, or made with the *bonâ fide* object of enforcing the decree. *Degun Singh v. Ram Sahay Singh*, 6 W. R. MIS. 98; *Bharotee Dabea v. Kurroona Moyee Dossee*, 10 W. R. 229. But an application for execution may be *bonâ fide*, notwithstanding that *batta*, or *tullubana*, has

not been paid. *Dalvi v. Lakshuman Hari Patil*, 4 Bom. A. C. 86.

If an interval of more than one year has elapsed between the date of the decree and the application to execute it, or if it be sought to enforce the decree against the heir or representative of the judgment-debtor, it is required by Section 216, Act VIII of 1859, that a notice should issue to the party against whom it is sought to execute the decree, to show cause why it should not be executed.

The issue of such a notice with a real intention and desire on the part of the decree-holder to enforce execution, is a proceeding, within the meaning of this Section, to keep the decree alive. *Degun Singh v. Ram Sahay Singh*, 6 W. R. MIS. 98; *Luckhee Narain Chuckerbutty v. Ram Chand Sirkar*, 6 W. R. MIS. 63; *Trilochun Chatterjee v. Radhamonce Dossee*, 6 W. R. MIS. 74; *Shoo Chand Chunder v. Grant*, 7 W. R. 10; *Modhoosoodun Chowdhry v. Obhoy Churn Dutt*, 9 W. R. 330. The expenditure of money in getting the notice served may be evidence of the *bona fides* of the decree-holder. *Mahomed Bakur Khan v. Sham Dey Koor*, 12 W. R. 281. But if the notice has not been served, and endeavour has not been made to serve it, that may be taken to indicate *mala fides* on the part of the decree-holder, and may enable the debtor to plead that no *bona fide* proceedings have been taken to enforce the decree. *Nistarinee Dabca v. Kistokant Bural*, 8 W. R. 268. So where a notice was returned with an endorsement that the party for whom it was intended did not live in the place where it had been served, and the decree-holder made no subsequent attempt to amend his mistake, it was held that such service was not a proper and legal proceeding to keep alive the decree. *Fuezun Beebee v. Mazedoonnissa Beebee*, 4 W. R. MIS. 6. Compare *Sham Chand Bysack v. Lucas*, 5 W. R. MIS. 5; *Girjanund Oopadhya v. Chunder Binode*

Oopadhya, 5 W. R. MIS. 5. Where a Court, on evidence that the notices in certain execution cases had not been properly served, found that the proceedings were not *bonâ fide*, the finding was held by the High Court to be one of fact, which could not be disturbed on special appeal. *Abdool Azeez v. Shumsoonnissa*, 11 W. R. 263.

A decree-holder applied for execution one day before the expiry of the three years allowed for executing, but after notice had been issued and returned as served, did nothing further in the matter. It was held to be a just inference that his proceedings were not *bonâ fide*, *i. e.*, not really taken with the intention of obtaining the fruits of his decree. *Gooroo Dossee v. Ramdhone Goor*, 13 W. R. 40.

Where a judgment-debtor appears and contests the decree-holder's right to execute, he cannot object that notice was not served as required by law. *Girish Chunder Bannerjee v. Bhanoo Motee Chowdhraïn*, 11 W. R. 329. An admission by the vakeel of a judgment-debtor that notice had been duly served, is binding on the judgment-debtor. *Koonwar Narain Boy v. Sreenath Mitter*, 9 W. R. 485.

An application having been made by a decree-holder for execution of his decree, notice was issued to the judgment-debtors on the 24th April, 1862, and they appeared on the 11th June following. Nothing was done after that date to carry out the decree, and on the 11th September, 1862, the application was struck off the file, the vakeel of the decree-holder having admitted that he was unable to proceed with the case, as he had received no instructions from his client. A renewed application for execution having been made on the 9th September, 1865, it was contended that the application was in time, as made within three years from the date when the former application was rejected. But it was held by the High Court that as there had been no adjudication when the former application had been struck off the file, limitation could

not be reckoned from that time, and as the last proceeding taken by the decree-holder could not be carried down later than the 11th June, 1862, that the subsequent application was barred. *Doya Moyee Dossee v. Debnath Haldar*, 6 W. R. MIS. 34.

A, holding a decree against B, died. C applied to be admitted as representative of the deceased decree-holder and for execution of the decree, but his petition was refused on the ground of his not having obtained a certificate of heirship under Act XXVII of 1860. Subsequently, after obtaining a certificate, C again applied, but his application being made more than three years from the date of the decree, was held to be barred. On appeal to the High Court, the order of the lower Court was confirmed, and it was observed that the *abortive* petition, presented by C before obtaining his certificate, was not a proceeding, within the meaning of the Section under notice, by which the decree could be kept in force. *Sheo Pertap Lal v. Issur Roy*, 5 W. R. MIS. 23; *Lalla Bishen Dyal Singh v. Ram Sunkur Tewaree*, 6 W. R. MIS. 38. The authority of these cases may, however, be questioned. It has more recently been held that an application made by the heirs of a judgment-creditor for execution of the decree may be *bonâ fide*, although they have not taken out a certificate of heirship under Act XXVII of 1860. *Ram Churn Singh v. Kalichurn Singh*, 11 W. R. 204. *Adina Bibi v. Subub-unnessa Bibi*, 3 Ben. AP. 142.

But where the heirs of a judgment-creditor on applying for execution have been ordered by the Court to produce a certificate of heirship, and, on their failing to do so, the case has been struck off, it has been held that their application was not such a *bonâ fide* proceeding as would keep the decree alive. *Lachmipat Singh v. Wahid Ali*, 2 Ben. A. C. 194.

The heirs of a judgment-creditor applying for execution of his decree, the Court made an order that execution

should not be granted unless the petitioners produced a certificate of heirship. The petitioners accordingly applied for a certificate. It was held by the Madras High Court, that the application for the certificate of heirship was not a proceeding to keep alive the decree within the meaning of this Section. *Lakshamma v. Venkataragava Chariar*, 4 Mad. 89; *Virabhadra Rau v. Ramaiya*, 4 Mad. 148.

An application for execution of a decree should not be rejected for a mere irregularity in form. Where the application is irregular, the Judge should either return it immediately to the applicant for correction, or himself cause the necessary correction to be made. *Chowdhry Purladh Mohaputtur v. Chowdhry Junardun Mohaputtur*, 6 W. R. MIS. 15. In this case an application made within time, after having been allowed to remain on the file for six months, was struck off by the Judge as irregular. A second application made within ten days from the rejection of the first, was held by the Judge to be barred. But on appeal to the High Court it was decided that the second application was to be considered as merely a correction of the first, and that its rejection by the Judge was erroneous.

Where an application for execution has been filed within time, but has not been disposed of within time, owing to the dilatoriness of the Court, the petition ought not to be rejected as out of time upon the ground that the petitioner was bound to remind the Court of its duty by motion or otherwise. *Rajah Sutto Surun Ghosal v. Nobin Chunder Does*, 5 W. R. MIS. 6; *Kripa Moyce Dossee v. Poorun Chunder Roy*, 11 W. R. 403.

By Sections 284—296, Act VIII of 1859, provision is made for the execution of a decree out of the jurisdiction of the Court by which the decree was passed. Where a decree is referred for execution to another Court, the Court to which it is referred has full power to determine whether

the application for execution is in time or not. *Buzur Beebee v. Jackson*, 5 W. R. MIS. 14; *Bhugwan Chunder Dutt v. Luchun Sahay* 6 W. R. MIS. 118; *Joygopal Chatterjee v. Bykantnath Mullick*, 7 W. R. 19; *Leake v. Daniel* 10 W. R. F. B. 10; *Binode Ram Sen v. Brojendro Narain Roy*, 11 W. R. 269. An application to the Court which issued the decree to transmit a copy thereof to another Court for the purpose of execution, and an order passed by the first Court on that application, are proceedings taken to enforce the decree within the scope of the Section under notice, and serve to keep the decree alive. *Lallah Nundo Coomar v. Ramdoss*, 1 Ind. Jur. N. S. 152.

Where the Court in which a decree was obtained and that to which it is transmitted for execution are governed by different laws of limitation, the law which governs the Court to which the decree is transmitted will regulate its execution. *Leake v. Daniel*, 10 W. R. F. B. 10; *Ali Mirza v. Ram Narain Sen*, 11 W. R. 430.

The issue and execution of process serve to keep a decree alive. An attachment of property in execution of a decree operates *de die in diem* as process of execution upon the decree. *Brooks v. Pattam Mari Nunjappa Naick*, 4 Mad. 316. Such an attachment, although afterwards withdrawn or set aside, may be an effectual proceeding within this Section to keep alive the decree. *Prossanna Coomar Mookerjee v. Ramtonoo Chunder*, 5 W. R. MIS. 43. An appeal from an order setting aside an attachment, may be a *bonâ fide* proceeding to keep alive a decree. *Kali Pershad Singh v. Janokee Deo Narain*, 7 W. R. 9. In this case, the Court observed that there was nothing in the Section to limit the proceedings therein referred to, to original proceedings, and that an appeal from an order setting aside an attachment might properly be regarded as a proceeding the *bonâ fide* object of which was to enforce the decree.

Certain property having been attached and advertised

for sale in execution, the decree-holder asked the Court to stay further proceedings for six weeks, as the debtor had made a part-payment, but prayed that the attachment might be considered as still in force. The execution case was thereupon removed from the file. On a subsequent application for execution it was held that the order striking the case from the file, which was passed for the Court's convenience, did not put an end to the attachment, and that the attachment continued in force, notwithstanding there had been a year's delay on the part of the decree-holder in applying again for execution. *Dacosta v. Kali Pershad Singh*, 12 W. R. 260. Compare *Golam Yaheya v. Sham Soonduree Kooeree*, 12 W. R. 142.

A decree-holder applied for the sale of certain property which had been attached in the suit in which the decree had been obtained. The Court refused to issue process for the sale of the property, on the ground that certain claims and suits respecting it were pending. These having been determined, the application was renewed. Although more than three years had elapsed between the date of the order on the first application and the date of the renewed application, it was held by the Madras High Court that the second application was in time, since the order upon the first application operated simply as a temporary stay of process for the sale of the property, during which the proceedings to enforce execution might be considered to have been pending. *Ragava Pishardi v. Ayumanjiri Mankal Thupan*, 4 Mad. 261.

Where an attachment had been disallowed, and the decree-holder had afterwards consented that the application for attachment should be struck off, it was held by the Agra High Court, on a subsequent application for execution being made, that limitation was to be reckoned from the date when the attachment was disallowed, and not from the later date when the decree-holder consented to the application for attachment being struck off, since

such consent was in fact a relinquishment, and not a prosecution of efforts to enforce the decree. *Tetley v. Peet Singh*, 1 Agra, F. B. 156.

Where a decree-holder expends money in procuring the attachment of his debtor's property, and in advertising it for sale, his proceedings will be presumed to be *bond fide* till the contrary be shewn. *Juttadharee Singh v. Woozeer Singh*, 12 W. R. 357.

A applied for execution of a decree which he had obtained against B, and property belonging to B was attached and sold in partial satisfaction of his claim. Other property belonging to B was likewise attached and sold at the instance of C, who also had obtained a decree against him. A applied for and obtained an order to share rateably in the proceeds of the sale effected by C, and did receive accordingly. But on application by C, A was ordered to refund what he had received. A then applied for further execution of his decree. It was held that the efforts made by him to participate in the proceeds of C's execution, were proceedings taken *bond fide* in furtherance of the execution of his own decree, and kept it alive. *Ram Soondur v. Ram Kanto*, 11 W. R. 8.

In the ordinary case of a sale in execution, it has been held that the latest act of the decree-holder to keep his decree in force is the sale itself, not the confirmation of the sale, that being merely a formal proceeding with which the decree-holder has nothing to do.* But where the regularity of the sale, or of the proceedings attending it, has been objected to, and the decree-holder has appeared to resist such objections, he will be considered to have been taking proceedings to keep his decree in force, or to enforce it. *The Maharajah of Burdwan v. Luckheemonee Dabca*, 8 W. R. 359 ; *Jugut • Mohinee Beebee v. Ram Chand Ghose*, 9 W. R. 100.

* It may, however, be said that act of the Court set in motion by the confirmation of the sale is an the decree-holder.

The mere act of taking out of Court the proceeds of a previous sale in execution, is not a proceeding which keeps the decree alive. *Chunder Kant Chuckerbutty v. Kishen Mohun Jush*, 6 W. R. MIS. 49. But where a decree-holder, with a view to the levying of costs, applied for issue of notice of sale of the judgment-debtor's goods; and the judgment-debtor, four days afterwards, to prevent the sale of his goods paid money into Court which was at once taken out by the decree-holder, the act of taking out the money under such circumstances would seem to have been held by the Calcutta High Court to be a proceeding keeping alive the decree. *Kali Coomar Roy v. Jogesh Prokash Gangooly*, 8 W. R. 274. But compare *Maharaj Dheraj Mahatab Chand Bahadoor v. Gunga Bishen Chand*, 10 W. R. 224; *Maharaj Dheraj Mahatab Chand Bahadoor v. Ram Bromho Mullick*, 13 W. R. 38.

Where a decree has been obtained for possession, mesne profits, and costs, proceedings taken to execute it in respect of any one of these particulars, keep it alive in respect of the others. *Oopendro Mohun Mostafee v. Tripp*, 5 W. R. MIS. 40; *Ram Kishore Dutt v. Barodakant Roy*, 8 W. R. 99; *Kali Coomar Roy v. Jogesh Prokash Gangooly*, 8 W. R. 274.

A holding a decree against B for a certain sum with interest until the date of realization, applied for execution. The Court in which the application was made, withheld interest, on the ground that A had been dilatory in taking out execution. But, on appeal, it was held by the High Court that so long as A did not incur the loss of his right by limitation, he could not be deprived of the interest which the decree allowed him, and that it was for B to have paid the amount due under the decree, if he wished to escape the payment of further interest. *Modhoo-soodun Roy Chowdhry v. Bheekaree Roy Chowdhry*, 5 W. R. MIS. 11.

It is a question whether payments made on account of a decree, otherwise than through the Court, and which

have not been certified to the Court, can be recognized as keeping alive the decree. In the case of *Kedarnath Mahata v. Heeralall Mundul*, 4 W. R. MIS. 21, it was held that they *cannot*, since the words of Section 206, Act VIII of 1859, are imperative and forbid the recognition of all private payments. This decision might seem to be in accordance with the plain terms of the Section referred to. But in the case of *Bhoobunessuree Dabea v. Deenonath Sandyal*, 11 W. R. 232, a contrary view was followed. In this case PEACOCK, C. J., said :—" I am not sure that a part-payment under a decree may not be proved for the purpose of avoiding limitation, although the payment has not been made through the Court, or certified to the Court. I am disposed to think that the words 'no adjustment of a decree in part or in whole shall be recognized by the Court,' in Section 206, mean that no adjustment shall be recognized in favour of the debtor, unless it is made through the Court, or certified to the Court by the person in whose favour the decree has been made,—the meaning being, that the person in whose favour the decree has been made, is not to be bound by an alleged payment out of Court, unless he has certified it. If the Legislature had contemplated the Statute of Limitation, and had intended to prevent a payment made within the period of limitation from being made use of to prevent the operation of limitation, I should think they would in that case have required the payment to be certified by the defendant, who would in that case be affected by it." It was accordingly held that payments in satisfaction of a decree, made out of Court, and not at the time certified to the Court, might nevertheless, be recognized by the Court, with the effect of keeping alive the decree. This ruling has been confirmed by a decision of the Full Bench of the Calcutta High Court in the case of *Fukeer Chand Bose v. Muddun Mohun Ghose*, 13 W. R. F. B. 40. Compare *Gunganarain Chowdhry v. Phul Mahomed Sirkar*, 2 Ben. AP. 45.

Where a decree is a joint one in favour of several plaintiffs the right of one of the decree-holders to execute is kept alive by proceedings in execution duly taken by another of the joint decree-holders. *Ameeroonnissa Khatoon v. Johceeroonnissa Khatoon*, 6 W. R. MIS. 59; *Pranath Roy Chowdhry v. Roy Preonath Chowdhry*, 8 W. R. 100; *Koonwar Narain Roy v. Sreenath Mitter*, 9 W. R. 485; *Shushee Bhoosun Bose v. Azeeroonnissa Khatoon*, 11 W. R. 343; *Dhunnessuree v. Godadthur Sahay*, 11 W. R. 421. Any arrangement made by the joint decree-holders among themselves as to their relative shares in the amount of the decree will not alter its character, and efforts made *bonâ fide* by one of the number to execute the decree, will keep alive the rights of all. *Ram Bux Chatterjee v. Brojocoomar Mullick*, 1 W. R. MIS. 1. But in the absence of any order in the decree awarding particular sums to each decree-holder, it is contrary to law to allow one of the decree-holders to take out execution of such portion only of the decree as he considers due to himself. For although Section 207, Act VIII of 1859,* allows execution to be taken out by one or more of several decree-holders, if the Court see sufficient cause for allowing them to do so, such execution must be of the *whole* decree, the Court at the time of granting such permission making such order as is necessary for the protection of the rights of the other decree-holders. *Maharanee Indurjeet Koonwar v. Mazum Ali Khan*, 6 W. R. MIS. 76; *Ram Bux Chuttangee v. Judoonath Roy*, 7 W. R. 535; *Pooroo Chunder Mookerjee v. Saroda Churn Roy*, 11 W. R. 241; *Huro Sunkur Sandyal v. Taruck Chunder Bhattacharjee*, 11 W. R. 488.

In executing a decree obtained against several defendants, the creditor is at liberty to proceed against all or any

* Where a joint decree for damages has been obtained by several plaintiffs and some of these afterwards die, execution may be obtained, under Section 207 of Act

VIII of 1859, by the survivors for the benefit of all parties interested in it. *Teja Singh v. Rajnarayan Singh*, 1 Ben. A. c. 62.

of his debtors as he may choose. *Suhb Ram v. Sreenath Ghose*, 12 W. R. 305.

A joint decree given against several defendants, is kept alive as against the rest by proceedings duly taken in execution against one or more out of the number. *Unnoda Dossee v. Stephenson*, 6 W. R. MIS. 18; *Pogose v. Abdool Gunnee*, 12 W. R. 436.

Where one of two defendants appeals against a joint and several decree, and the appeal imperils the whole decree, it has been held that the time for execution as against both defendants, should be computed from the date of the decision on appeal. *Chedoo Lall v. Nund Coomar Lall*, 6 W. R. MIS. 60.

A having obtained a decree for costs against B, C, D, and E, took out execution against all of them, and recovered a portion of the judgment-debt from B and C, whom he then released from any further payment under the decree. Within three years from the date of these proceedings, but more than three years from the date of his decree, A applied for execution against the property of D and E, for the amount still due by them under the decree. The Court in which the application was made, being of opinion that A, by releasing B and C, had altered the decree from a joint decree against all the debtors, into a several decree against each particular debtor, refused execution on the ground that it was barred by limitation under this Section. On appeal, this decision was reversed by the Calcutta High Court. The Court observed:—"The decree is for costs. The petitioner has recovered from one set of judgment-debtors the amount of costs calculated according to their share in the estate which was the subject of suit. He now goes on within three years to recover the amount still due from the other sharers. We think he is entitled to carry on the execution. Limitation does not bar him. He has taken proceedings to enforce the decree within three years of his

present application. The decree is not several, and has not become several. The petitioner, acting very fairly, executes his decree against each debtor for the amount which is equitably due from him. There might be circumstances under which the execution of a decree against one debtor might not be sufficient to keep it alive against other debtors. But no such circumstances are to be found in this case." *Shaikh Bunead Ali v. Juggessur Singh*, 6 W. R. MIS. 25.

Where a sharer in a joint estate sued his co-sharers A, B and C for money paid on their behalf on account of Government Revenue, and obtained a decree in which the amounts, for which the several co-sharers were liable with costs in proportion, were separately awarded, and duly took out execution against A and B, and subsequently applied for execution against C, it was held by the High Court that the decree against C was kept alive by the proceedings in execution taken against A and B. *Mohesh Chunder Chowdhry v. Mohun Lall Sirkar*, 8 W. R. 80. But a contrary view would seem to have been followed by the Court in the case of *Khema Dabca v. Komola Kant Bukshee*, 10 W. R. 10.

In the year 1845, B and C, against whom A had obtained a decree, entered into an arrangement with A, in which they engaged to pay their debt by instalments in the course of four years. D became surety for B and C, under a bond, in which he agreed that upon their failure to pay the debt or any instalment thereof, he should become liable, and execution might at once be taken out against him. A took no steps as against D, until the year 1856, when he applied for execution against him. D, thereupon, filed a petition alleging that he could not be proceeded against summarily, which petition was rejected, but no steps were then taken to enforce execution against him. A similar application was again made by A in 1858, but on this occasion also, execution was not

enforced. From 1858, to the end of 1865, A, from time to time, brought property of the debtors B and C to sale. Having at last exhausted their means, he sought in the beginning of 1866, to realize the balance of his debt from D, alleging that D was, by his own act, jointly liable with B and C, and that as he, A, had kept his decree alive against B and C, he was entitled to proceed against D. The Court, in which the application for execution was made, considering D to be in the same position as B and C, for whose debt he had made himself liable, allowed execution to issue. But on appeal to the High Court, the view taken by the lower Court was held to be erroneous. The Court observed that D as surety, was not jointly and severally liable with B and C, the judgment-debtors, for the payment of the debt, but was only liable on their failure to pay it. His liability commenced from the time when the debtors failed to pay according to the terms of their *kistibundee*. The circumstance of D having acquiesced in, and not appealed from the order of 1856, declaring him to be liable to be proceeded against in execution, might prevent him from again pleading non-liability, but that circumstance did not put him on the same footing as the original debtors. Proceedings against one or other of the joint debtors which would keep the decree alive as against them, would not affect him. His was a separate responsibility, and admitting, what seems very doubtful, that he could be proceeded against in execution of the original decree, execution should have been taken out against him from the date when his liability commenced, and the decree should have been kept alive as against him by proceedings irrespective of those taken against the original judgment-debtors. As no proceedings had been taken against D, since 1858, the Court was of opinion that the application was out of time. *Hurkoo Singh v. Baboo Ram Kishen*, 6 W. R. MIS. 44.

The proceedings intended by this Section, are not to be

exclusively understood as proceedings taken directly to obtain execution. The holder of a decree passed in the year 1858, having applied for execution in 1864, the judgment-debtor pleaded limitation. It appeared that the decree-holder had sought to execute his decree in the year 1859, and had attached property to which a claim was raised by a third party, on whose application it was released. The decree-holder had thereupon brought an action to set aside the order of release, and to render the property liable to sale in satisfaction of his decree, and was successful. He then sought to execute his original decree by the sale of the property which had been the subject of litigation. It was held that as that litigation had been undertaken in furtherance of the original decree, the decree was fully kept alive thereby, and, consequently, that the decree-holder was not barred by limitation. It was observed that "although the words of the law speak of a 'proceeding,' and the second suit was not a proceeding within the exact meaning of the word as used in Sections 20 and 21 of Act XIV of 1859, yet as the subsequent litigation was necessary to enable the decree-holder to carry out his decree, it was sufficient to keep the decree alive." *Rajkishen v. Shureefoonnissa*, 4 W. R. MIS. 24; *Kashee Pershad Roy v. Shib Chunder Deb*, 2 W. R. MIS. 3. The decree-holder's resistance to legal proceedings instituted by a third party, the effect of which is to interfere with the execution of the decree, will count as a proceeding, just as effectually as proceedings actually initiated by the decree-holder himself. *Kalikishore Bose v. Prossonno Chunder Roy*, 10 W. R. 248. But compare *Mookoond Pershad Roy v. Prossonno Chunder Roy*, 11 W. R. 210, in which a litigation with a third party was held not to be a proceeding. See, also, *Mohamoya Dabea Chowdhraïn v. Narain Acharjee Chowdhry*, 10 W. R. 240.

A suit by a decree-holder to set aside orders passed under Section 246, Act VIII of 1859, and to declare his

right to sell a certain estate as the property of his judgment-debtor in execution of his decree, is a suit in furtherance of the decree, and is a proceeding, within the meaning of the Section under notice, to enforce such decree. *Brojessuree Chowdhraïn v. Ramcoomar Chowdhry*, 6 W. R. MIS. 15. In this case the Court observed :—"The law requires in general terms that some proceeding shall be taken to keep the decree in force. It does not say that such proceeding must be taken in the Execution Department. If proceedings have been carried out in that department as far as the law allows, and then take the shape of a regular suit to contest the orders passed in the Execution Department, that suit is also a proceeding keeping the decree in force." Compare *Kalichurn Roy Chowdhry v. Gyan Chunder Roy Chowdhry*, 7 W. R. 48.

Even although a suit by a decree-holder for the purpose of having certain property made liable under his decree, prove unsuccessful, it may be considered a proceeding to keep the decree in force. *Jugobundhoo Bose v. Ishan Chunder Bose*, 8 W. R. 98; *Beebee Nufeezun v. Akbar Gazeë*, 8 W. R. 99. But a litigation which was wholly unnecessary, and which could not, even if successful, have removed any obstacle to the execution of the decree, cannot be considered to be a proceeding to enforce a decree within the meaning of this Section. *Rajah Rooknee Bullub Bahadoor v. Junardhun Doss Mitter*, 6 W. R. MIS. 48.

In the case of *Fuzeelutoonnissa v. Chutter Dharce Singh*, 6 W. R. MIS. 43, it was held that an attempt at settlement of accounts in Court, might be sufficient to keep alive a decree.

It has been remarked that this Section, if interpreted literally, would prevent execution of any decree; since even if execution were applied for immediately after the decree was passed, it might be refused on the ground that no proceeding had been taken to enforce the decree within

three years next preceding the application. The meaning of the Section, however, clearly is, that after the expiration of three years from the date of a decree, process of execution shall not issue, unless some proceeding to enforce it, or to keep it in force, has been taken within three years from the date of the application. *Degun Singh v. Ram Sahay Singh*, 6 W. R. MIS. 98. Three years from the date of a decree are therefore to be allowed for its execution. Should that period run out, without any proceeding being taken to enforce it, or keep it in force, execution will be barred. If such proceedings have been taken, a new period of three years from their date, will be allowed for obtaining execution. *Kangaleechurn Ghosal v. Bonomalee Mullick*, 7 W. R. 515.

Where on a former application for execution, an order has been made for issue of process, limitation runs, not from the date of the application, but from the date of the order passed thereon. *Ramanuja Aiyangar v. Venkata Charry*, 4 Mad. 260.

It has been held that 'the three years next preceding the application for execution,' are to be computed excluding the day on which the application is made. So where the date of a decree was the 9th July 1864, an application for execution made on the 9th July 1867, was considered to be in time. *Brojo Beharee Sahay v. Kewal Ram*, 10 W. R. 5; *Virasamy Mudali v. Manommany Ammal*, 4 Mad. 32. Compare *Mancharam Kallianadas v. Ratilal Lalshankar*, 6 Bom. A. C. 39.

Where the execution of a decree has become absolutely barred by limitation, no subsequent proceedings, whether permitted by the inadvertence of the Court, or by the silence of the judgment-debtor, can revive the right to execute. *Boroda Dabea v. Sreeram Chowdhry*, 5 W. R. MIS. 20; *Kool Chunder Chuckerbutty v. Kumul Chunder Roy*, 6 W. R. MIS. 17; *Bhugcan Chunder Dutt v. Luchmun Sahay*, 6 W. R. MIS. 118; *Khajah Abdool Gunnee v. Ramdhun Roy*, 9 W. R. 390.

Some doubt having arisen as to the correctness of the decisions in these cases, the point was referred for the opinion of a Full Bench in the case of *Maharaj Dheraj Mahatab Chand Bahadoor v. Bissessur Mullick*, 10 W. R. F. B. 8, in which the facts were as follows:—A decree had been obtained on the 31st August, 1859. On the 20th August, 1861, the judgment-creditor applied for execution and served a notice on his judgment-debtor. A second application for execution was made on the 13th September, 1865, when a similar notice was again served. Subsequently in August, 1866, application was made to arrest the person of the judgment-debtor. A final application for execution having been made in the beginning of 1867, the judgment-debtor objected that as execution was barred under the provisions of this Section when the application for execution was made on the 13th September, 1865, the decree could not be revived by any proceedings then, or subsequently, taken. On the other hand, it was contended for the decree-holder that by the terms of the Section construed literally, the Court has only to ascertain whether any real and effectual proceeding has been taken to keep the decree in force within the three years next preceding the application for execution, and that when such is found to have been the case, the application is not barred by reason that at some previous time the decree may have been dead. In giving judgment in this case PEACOCK, C. J., said:—"It appears to me that the application made on the 13th September, 1865, was not a proceeding within the meaning of Section 20. By the word 'proceeding' in that Section, I understand the Legislature to have intended a proceeding not barred by limitation, and under which process of execution might have been lawfully issued if the application had been opposed. If this were not so, a person after a decree was barred, might make an application to enforce its execution. Such application for execution ought, under Section 20, to be refused. But if the argument

in the present case is correct, the applicant might in such cases make a fresh application, and in support of it, avail himself of the one which had just been refused, as an application which had been made *bonâ fide* within three years. If the application of the 13th September, 1865, was not a proceeding within the meaning of the Section at the time when it was made, it could not subsequently become so, merely because the judgment-debtor did not come in and oppose it. The non-opposition by the judgment-debtor clearly was not a proceeding, nor was the issue of process by the Court in a case in which that process ought to have been refused, a proceeding within the meaning of the Act. Under these circumstances, it appears that the application which was last made was barred by limitation." Compare *Gour Monce Dabea v. Tiluck Chunder Gooho*, 6 W. R. MIS. 91; *Radhoo Chowdhraïn v. Heet Lall Roy*, 11 W. R. 209; *Gholum Ashgar v. Lakhimani Debi*, 2 Ben. AP. 24; *Soochee Sikhur Mookerjee v. Bhooputtee Lall Tewarce*, 12 W. R. 255.

With reference to the decision of the Full Bench above cited, it may be remarked, that one of the Judges, while concurring with the ruling of the Court upon the case under consideration, expressed a doubt, whether, when former proceedings have actually been taken in execution, of which the judgment-debtor has had notice, and to which he has submitted without objection, neither opposing them, nor appealing against them, nor otherwise seeking to set them aside, it would be competent for him, or for the Court, on a subsequent application for execution being made, to question the regularity or sufficiency of these proceedings. Compare *Gour Monce Dabea, v. Nil Madhub Gooho*, 5 W. R. MIS. 3; *Shib Pershad Thakoor v. Ameerun Beebee*, 8 W. R. 199.

Under the former practice, as has already been noticed, the period of limitation in cases of execution was extended for any reason which seemed good and sufficient to the

Court in which the application for execution was made. The only circumstance which is recognized by the terms of the present Section as a ground for extending the period of limitation in cases of execution, is the fact of some proceeding having been taken to enforce, or keep in force the judgment, decree, or order which it is sought to execute, within three years next preceding the application for execution. A question has, however, arisen whether the terms of this Section may not be modified by applying to them the provisions of those previous Sections of the Act which allow of an extension of time in certain cases.

In several decisions the provisions of Section 4 of the Act would seem to have had effect given them for this purpose. A decree having originally been passed in 1840, execution thereon was from time to time taken out. In the year 1863, the judgment-debtor's property being then under attachment, she filed a petition in which she admitted the debt, and prayed that as she had come to an arrangement with her creditor, the attachment on her property might be removed. The decree-holder's consent to this arrangement was endorsed on the back of the petition, and the attached property was accordingly released. On a renewed application for execution in 1864, the judgment-debtor pleaded that as the proceedings taken in execution in 1863, were barred by limitation, any subsequent attempt to execute was out of time; and that the admission of the debt did not bring the case within time under the provisions of Section 20, which, unlike Section 19 of the Act, makes no reference to admissions as giving a decree-holder a fresh starting-point from which to reckon limitation. But the Court to which the application was made, allowed execution to issue; and this order was on appeal confirmed by the High Court in the following judgment:—"We may concede that Section 19 has nothing to do with this suit, and that the wording of Section 20, might, under ordinary circumstances, bear the meaning attached to it

by the judgment-debtor. But in this case, the debt was admitted after execution had been taken out in 1863. No objection was then made that the proceedings were barred by limitation; and whatever laches there may have been then on the part of the decree-holder, were condoned by the act of the debtor in admitting the claim, and begging for time wherein to pay. This gives, we consider, a fresh starting-point from which execution should be dated; and as the present execution was taken out in 1864, there can be no question that it was fully within time." *Saroda Persad Roy v. Digumburee Dabea*, 3 W. R. MIS. 27.

A decree having been passed on the 4th December, 1856, execution was applied for on the 1st June, 1864, when notice was given to the judgment-debtor who by a petition, dated the 21st July, 1864, admitted a part of the decree-holder's claim, and agreed to pay the amount which he admitted. The Court held that by so doing, the judgment-debtor had condoned the laches of the decree-holder, to whom a fresh starting-point for reckoning limitation was given by his debtor's admission, and, consequently, that execution might issue. *Shudasheo Singh v. Luchmee Narain*, 5 W. R. MIS. 12.

Where, upon a petition for the revival of execution, a judgment-debtor's property was attached for sale, and the debtor being arrested in execution of the decree, filed a petition, admitting his liability, and asking to be released on the ground that his debt might be realized from the sale of the attached property, it was held on the authority of the case last cited, that the debtor had debarred himself from pleading that the petition for revival of execution was filed more than three years after the last effectual step taken to keep the decree alive. The Court observed that such an admission by the debtor, and such a condonement by him of the laches of the decree-holder, if such there were, prevented the question of limitation from being taken up in the case. *Kashee Kant Bhuttacharjee v. Prossonno Coomar Roy Chowdhry*, 5 W. R. MIS. 31.

A party admitting his liability for the judgment-debt of an ancestor, settled in Court a suit brought against him by the decree-holder for the recovery of the debt, by entering into a written compromise in which he engaged to pay the amount by instalments. The decree-holder applied for execution within three years from the date of the compromise. It was held that the law of limitation could not be applied to prevent execution on the ground that previous to the compromise the decree-holder was in laches. *Okhil Chunder Surkhel v. Bromho Moyee Dabea*, 4 W. R. MIS. 10. See also *Ramnarain Dey Sircar v. Chunder Kant Mitter*, 8 W. R. 63.

If the cases above cited were to be relied upon, they would seem to show that a written admission of his debt made by the judgment-debtor, even after the time when proceedings in execution have become barred by limitation, will afford a fresh starting-point, from which a new period within which execution may be applied for, may be computed.

But in the case of *Soochee Seekhur Mookerjee v. Bhoo-putty Lall Tewarree*, 12 W. R. 255, it was observed that the decisions in the cases of *Saroda Pershad Roy* and *Shudasheo Singh*, are no longer binding, having been substantially over-ruled by the decision of the Full Bench in the case of *Maharaj Dheraj Mahatab Chand Bahadoor v. Bissessur Mullick*, 10 W. R. F. B. 8, by which it was determined that a decree once barred, is always barred.

In the case of *Luchmun Bhukut v. Luchmun Koonwar*, 7 W. R. 79, it was held that incidental mention made by a judgment-debtor in a petition presented by him during the pendency of proceedings in execution at the instance of one decree-holder, of his indebtedness to another decree-holder, was not an admission which would avail the latter when he applied for execution of his decree. In this case the Court broadly said:—"We have no doubt that Section 4, Act XIV of 1859 is not applicable to the execu-

tion of decrees, and the Judge is wrong in applying it to this case."

A relative professing to act as guardian of certain minors, instituted a suit in their behalf, and obtained a decree, but subsequently, in fraud of the minors, sold their decree to a third party who was merely a *benamtee* for the defendant in the suit. No execution was taken out on the decree. The minors when they came of age, sued to have the sale of their decree declared fraudulent and void, and to have their names substituted on the record for the name of the *benamtee* purchaser, and prayed that they might be allowed to take out execution of the said decree. In dealing with this claim, the Court observed :—"It is said that the suit is barred by limitation. Possibly, if the plaintiffs were to apply for the execution of the old decree, some objection might be raised under Section 20, Act XIV of 1859, on the ground that more than three years have elapsed since any proceeding, &c., has been taken on that decree. But considering the fraudulent nature of the whole of this transaction, and reading Section 20, along with Sections 9, 10, 11 and 12 of Act XIV of 1859, we have no doubt that execution might properly issue, even although more than three years have elapsed." *Meer Mahomed Mozuffur Hossein Chowdhry v. Moulvie Abdool Ali*, 5 W. R. 173.

In the case of *Anundo Koonwar v. Thakoor Panday*, 4 W. R. MIS. 21, the Court intimated an opinion that the provisions of Section 11 of the Act, which allow the time during which a plaintiff has been under a legal disability to be deducted in computing limitation against him, although intended primarily to apply to suits, are also referable to applications for execution of decrees. But in the case of *Rotty Rumun Oopadhya v. Binode Chunder Oopadhya*, 5 W. R. MIS. 10, in which the decree-holder urged that his application for execution was in time, as made within the prescribed period after attaining majority, the Court refused the application, ob-

serving :—" We know of no law or rule of practice which stays the law of limitation in cases of execution, pending the period a decree-holder may be under a legal disability. Section 11, Act XIV of 1859, relied on by the decree-holder, applies to *suits* and not to processes in execution of a decree."

The point was again negatively decided in the case of *Ranee Shurut Soonduree Dabee v. Chunder Coomar Roy*, 6 W. R. MIS. 37, the Court being of opinion that the word 'limitation' as used in Act XIV of 1859, is used with reference only to the periods within which *suits* can be instituted, and not with reference to the periods within which execution can be had ; and that the period prescribed by the Act with regard to the execution of decrees is absolute, and not subject to exception and extension on account of minority or other legal disability. To the same effect, see also *Tarucknath Mookerjee v. Poorno Chunder Chatterjee*, 8 W. R. 137.

In the case of *Darsiah Chinniah Chenchu v. Godain Chetty Veeriah*, 4 Mad. Jur., 101, it was held by the Madras High Court that the provisions of Section 13 of the Act, interrupting limitation during the time a defendant has been absent out of the British territories in India, cannot be applied to the execution of decrees. The Court said :—" The Section applies only to cases in which a summons to appear and answer in the *suit* has not been served, and in which it appears that legal service of such a summons could not have been effected during the period of the defendant's absence. Consequently it can only apply to the computation of the period made applicable to the institution of suits."

In the case of *Gossain Doss Dey v. Khetternath Dey*, 4 W. R. MIS. 18, it was held by a Division Bench of the Calcutta High Court, that the time during which a decree-holder had been endeavouring to obtain satisfaction of his decree by proceedings in execution taken in a wrong

Court, could not, by applying the provisions of Section 14 of the Act, be deducted in computing the three years allowed for execution by the Section under notice. The Court observed :—"Sections 1 to 18 of the Act relate distinctly to the time within which *suits* are to be instituted, and Section 14 provides that where a party has in good faith and with due diligence, been engaged in prosecuting a *suit* in a Court not having jurisdiction, the time during which the suit was pending in such Court shall not be counted against him. But this Section does not apply to cases of execution. With the decree, the right of the decree-holder is established, and he has only to carry out his decree under the 19th and following Sections of the law, as one or other of them may be applicable to the case; and we do not think that a party can be said to be acting in good faith, when he applies for the execution of a decree to a wrong Court, for it is a fundamental rule that unless otherwise ordered by competent authority, execution of a decree must be taken out in the Court which passed the decree." Similarly in the case of *Joogulkishen Ram v. Sheo Narain*, 7 W. R. 327, it was held that the words of Section 14, 'shall have been engaged in prosecuting a suit,' show that the Section relates to *suits* only, and that summary applications or proceedings in execution cannot properly be termed suits in the sense of the law.

But the authority of the last two decisions, and of the other cases above cited in which a distinction is drawn between *suits* and *cases in execution*, is shaken by the ruling of a Full Bench of the Calcutta High Court in the case of *Shooradhonee Dabea v. Huro Chunder Roy Chowdhry*, 9 W. R. 402. In this case the facts were the following. A obtained a decree against B for possession of certain lands. This decree having been reversed on appeal by the late Sudder Court, B applied to the Principal Sudder Ameen for restoration of the lands and for mesne profits.

The Principal Sudder Ameen restored her to the lands, and directed that the mesne profits should be ascertained and paid to her. This last order was reversed by a Division Bench of the High Court on the ground that the lower Court had *no jurisdiction* to give mesne profits when the decree of the Sudder Court had not awarded them. The High Court at the same time expressed an opinion that B should either have applied to the Sudder Court for an amendment of its decree, or have brought a separate suit. On this suggestion, B sued to recover mesne profits. A pleaded that the claim was barred, but B contended that the time during which the former proceedings in execution were pending, should be deducted. The case coming before a Division Bench of the High Court on appeal, and the Judges not agreeing with the views expressed in the case of *Gossain Doss Dey*, a reference was made to the Full Bench. It was held by a majority of the Court that in the execution proceedings which B had taken in the former suit to obtain mesne profits, she was 'prosecuting a suit, upon the same cause of action, against the same defendant,' within the meaning of Section 14 of the Act. On this point PEACOCK, C. J., said:—"The word 'suit' does not necessarily mean an 'action,' nor do the words 'cause of action' and 'defendant' necessarily mean 'cause upon which an action has been brought,' or 'a person against whom an action has been brought,' in the ordinary restricted sense of the words. Any proceeding in a Court of Justice to enforce a demand is a suit; the person who applies to the Court is a suitor for relief; the person who defends himself against the enforcement of the relief sought is a defendant; and the claim, if recoverable, is a cause of action. The Legislature has clearly shewn what it understood by the word 'suit,' for the Act which provides a period of limitation in the case of proceedings by process of execution to enforce judgments and decrees, as well as periods for the limitation of actions or suits in the

ordinary acceptation of the words, is described merely as an 'Act to provide for the Limitation of Suits,' and it recites that 'it is expedient to amend the law relating to the limitation of suits.' We ought not to fritter away the law by construing words according to a merely technical sense, instead of giving them a broad meaning, so as to embrace all cases intended by the Legislature to be provided for." It was, however, held by a majority of the Court that the order of the Principal Sudder Ameen had not in fact been reversed on the ground of 'want of jurisdiction or other cause' within the meaning of Section 14 of the Act, and consequently that the plaintiff was not entitled to any deduction in computing limitation.

A sold to C a decree which he had obtained against B. On C applying for execution, D contested his right, alleging that he, D, had obtained a decree against the assets of A. The Court in which C's application was made, did not at once dispose of the case, but allowed it to remain on the file for a period of nine months, when C, after obtaining an order permitting him to execute, suffered the case to be struck off. On a subsequent application by C for execution, it was held that the dispute between C the purchaser of the decree, and D a third party, and the proceedings connected therewith, could not be taken to be proceedings for enforcing the decree within the meaning of this Section; and that in calculating the time allowed by the Section, the period during which C's former application for execution had been pending could not be deducted. The Court observed:—"It is clear that no deduction of any kind can be made except under the provisions of Section 14, Act XIV of 1859; and it is also clear that that Section does not apply in any way to the circumstances of the present case." *Mohamoyu Dabea Chowdhraïn v. Narain Acharjee Chowdhry*, 10 W. R. 240. But see the cases cited, *ante*, in pp. 340-341.

Some uncertainty has arisen as to the manner in which this Section should be applied in cases where by the terms of the decree its operation is suspended, or an order is made for payment by instalments.

In accordance with an arrangement between the parties to a suit, a judgment was recorded for the plaintiff with a direction that the amount decreed should be paid into Court on or before a certain day named. Application for execution was made more than three years after the date of the decree, but within three years from the time fixed for payment by the terms of the decree. The Court in which the application for execution was made was of opinion that it was barred under this Section. But, on a reference to the Madras High Court it was held to be in time. The Court said :—"We are of opinion that Section 20 of the Limitation Act is not applicable to a decree until the liability under it has become enforceable by process of execution. The omission to take some proceedings, within three years, to enforce the decree, or to keep alive its force, constitutes the bar; and that necessarily implies that a liability under the decree was capable of being enforced by execution within that period." *Gopala Setty v. Damodara Setty*, 4 Mad. 173.

In the case of *Ram Lall v. Ultaf Ali Khan*, 1 Agra, F. B. 83, a reference was made to the Full Bench of the Agra High Court, as to whether a decree dischargeable by instalments extending over a period of more than three years, but which had not been enforced within that time, could be executed for an instalment falling due after that time within three years from the date when it became due; or whether execution was not barred in respect of such instalment by reason of no step having been taken within three years to enforce the decree. It was held by the Court that under such circumstances the enforcement of the decree was not barred, but that the instalments which became due after three years from the date of the

decree might be lawfully levied in execution, if such execution were applied for within three years from the time when they became payable in terms of the decree. It was observed that the provision of the Section under notice, that some proceeding to execute the decree within three years from its date is necessary to keep it alive, supposes a present right to execute the decree at the date when the judgment was pronounced. In such a case that right must be actively exercised within three years from the date of the decree, or the power of enforcing it is lost. But in the case of an instalment made payable by the terms of the decree at a future date, there is, of course, no present right to realize the instalment at the date of the judgment. It is only when the instalment falls due that the present right to enforce it accrues; and an application to enforce payment of such an instalment is within time, if made before the lapse of three years from the date fixed for payment by the terms of the decree, the omission to realize all previous instalments due from and after the date of the decree notwithstanding.

Similarly, it has been held by the Bombay High Court that when a decree awards payment to be made by instalments at particular specified dates, the date when each instalment becomes due is to be deemed the date of the decree in respect of that instalment for the purpose of calculating the time within which execution may be issued to enforce payment of it. *Panamchand v. Bhiraj*, 6 Bom. A. C. 38; *Utamram Manikram v. Girdharlal Motiram*, 6 Bom. A. C. 45.

A decree was passed in which it was ordered that the amount decreed should be paid by instalments. Nearly six years from the date of the decree, application was made by the judgment-creditor for execution in respect of certain instalments which he alleged to be still unpaid, giving credit, at the same time, for certain other instalments which he admitted having received out of Court.

The judgment-debtor denied having made any payments out of Court, and contended that even if he had made such payments, they would, in accordance with the decision in *Kedarnath Mahata*, cited, *ante*, p. 335, have had no effect to keep the decree alive, and that consequently the application was barred. The Court was, however, of opinion that payments so made would suffice to keep alive the decree; and further, that if it should appear that the plaintiff was seeking to enforce payment of instalments which had become due within the three years next preceding his application for execution, it would not be necessary for him to prove the payment of previous instalments. *Bhoobunessuree Dabea v. Dinonath Sandyal*, 11 W. R. 232.

A decree was passed directing payment of a debt by thirteen yearly instalments, under the condition that on failure to pay any one instalment, execution might issue for the whole sum then due. For several years no payments were made, but no proceedings in execution were taken by the decree-holder until the whole of the instalments had separately become due. Application for execution being then made by the decree-holder, it was held by a Division Bench of the Calcutta High Court that as no proceeding had been taken to execute the decree within three years from the date when payment of the instalments had been discontinued, execution was barred, even in respect of instalments falling due within the three years next preceding the application. *Gour Monce Dabea v. Tiluck Chunder Goocho*, 6 W. R. MIS. 92. In this case it would seem to have been the opinion of the Court that even if there had been no condition in the decree that execution might issue for the whole sum on failure to pay any one instalment, the later instalments could not have been realized unless the decree had been kept alive by proceedings taken within time to enforce payment of the earlier instalments as they became due. But this opinion is opposed to the rulings above cited.

Where no order for payment by instalments has been made in the decree itself, it sometimes happens that an arrangement is afterwards entered into between the parties for the liquidation of the judgment-debt by instalments. This arrangement may take the form of a bond, containing a condition that on failure to pay any instalment the entire sum then due under the decree may be realized at once by execution.

It does not appear that any provision has been made by the Legislature for carrying out such arrangements,* but they have been constantly favoured by the Courts, which in numerous cases have, on consent of parties,† passed orders that the instalment bond expressing the agreement between them, should be filed with the record of the case, and the decree executed in accordance with its terms.

Where an arrangement of the character indicated has been come to between the parties, and has been recognized by the Court, and incorporated with the original decree, it has repeatedly been held that execution should be allowed to issue as provided for in such arrangement, that limitation should be reckoned from the times therein fixed, and that there is no necessity to refer the decree-holder to a fresh suit. *Janokee v. Sreenath Roy Choudhry*, 5 W. R. MIS. 19; *Dwarkanath Sadhoo Khan v. Doorgachurn Saha*, 6 W. R. CIV. REF. 1; *Kalee Doss Bannerjee v. Tareef Biswas*, 11 W. R. 86; *Oopendro Mohun Tagore v. Takalia Beparee*, 11 W. R. 570; *Kalee Sahoo v. Khedoo*, 12 W. R. 71.‡ In all these cases limitation was reckoned from the dates fixed for payment by the agreement between

* Section 431 of the proposed Amended Civil Procedure Code, provides that a Court may order that the amount of a decree for money be paid by instalments, notwithstanding that the decree itself makes no provision for payment by instalments.

† Such an order, it has been held, cannot be made without the

consent of both parties. *Digumburee Dabee v. Nundo Gopal Bannerjee*, 1 W. R. MIS. 1; *Judobunsee Bhugtahee v. Mukkun Kowaree*, 1 W. R. MIS. 5.

‡ In the last three cases noted in the text, it seems to have been held that although the arrangement between the parties contains a condition that on failure to pay any

the parties, and execution was allowed to issue, although more than three years had run from the date of the original decree, and no proceeding had been taken to enforce the decree within the three years preceding the application to execute.

But the decision of a Full Bench of the Calcutta High Court in the case of *Kristo Komul Singh v. Huree Sirdar*, 13 W. R. F. B. 44, would seem to show that no effect can be given to any arrangement between the parties for extending the period for execution beyond the limit of three years from the date of the decree, when the decree itself is silent as to the time when execution may be taken out. In this case PEACOCK, C. J., said :—"Some cases have been decided in which it has been held that a *kisti-bundee* filed with the consent of the Court, has the effect of altering the time for payment under the decree. But for these decisions, I should have thought that a Court of execution was bound to execute the decree as it found it, and was not justified in adding to, or in any way altering the terms of the original decree in consequence of any consent of the parties.... It appears to me that a Court of execution has no power to alter a decree of the Court which passed it, and that parties cannot alter the law, or a decree of Court, even by consent. A man may bind himself not to execute a decree of Court within a certain period, but he cannot by binding himself not to execute the decree for a certain period, add to the time which the law allows him to execute it. If a man having a cause of action against another to recover immoveable property, or to recover money, or to recover damages for a trespass upon his land, or for an assault, should say to that person,

one instalment on the appointed date execution may issue for the whole amount then due under the decree, an application for execution made more than three years from the date of such failure, may nevertheless be allowed in respect of

such instalments as have fallen due within three years preceding the application to execute. But this view is not in accordance with the decision in the case of *Gour Monee Dabea*, cited, *ante*, p. 355.



‘I will not sue you for twenty years,’ he would not acquire a right to sue after the period of limitation fixed by law. If he binds himself not to sue within a stated period, and does not intend to give up his right to sue at all, he must take care not to bind himself beyond the time within which the Law of Limitation allows him to sue. So in the case of a decree, if a man binds himself not to execute a decree within a certain period, he must take care, if he wish to execute the decree at all, not to bind himself not to execute the decree for a longer period than that within which the law would allow him to execute it.”

A decree the execution of which is barred by limitation, cannot, under Section 209, Act VIII of 1859, be charged as a set-off in the execution of a decree which is not barred by limitation. *Prossonno Coomar Ghose v. Sham Lall Gangooly*, 5 W. R. MIS. 8; *Anund Mohun Soorma Mozoomdar v. Hurrochunder Bhattacharjee*, 5 W. R. MIS. 16; *Hemraj Chowdhry v. Asoodun*, 5 W. R. MIS. 43. But compare the case of *Nubo Lall Khan v. The Maharanee of Burdwan*, 9 W. R. 590.

Where the original decree-holder fails to execute his decree in time, any right that another party may subsequently establish to a share in the decree, can give no fresh starting point from which to compute limitation. *Kashessuree Dabea v. Prossonno Nath Sirkar*, 1 W. R. MIS. 31.

SECTION 21.

Nothing in the preceding Section shall apply to any judgment, decree, or order in force at the time of the passing of this Act, but process of execution may be issued either within the time now limited by law for issuing process of execution thereon or within three years next

Preceding Section not to apply to judgments, &c., in force at the time of the passing of this Act.

after the passing of this Act, whichever shall first expire.

IN the case of *Hukumchand Tikaram v. Bhagvantrav*, 1 Bom. 94, it was held by the Bombay High Court that the period of three years which this Section declares shall be reckoned from the *passing of the Act*, must under Section 2 of Act XI of 1861,—suspending the operation of Act XIV of 1859,—be reckoned as running from the 1st January, 1862, *when the Act came into operation*. A similar opinion was expressed by a Division Bench of the Calcutta High Court in the case of *Taranath Roy v. Rajbullub Bhunj*, 3 W. R. MIS. 2. But this decision was reversed on review, 6 W. R. MIS. 30, and it was held that from the time when Act XIV of 1859 came into operation, all cases became subject to its provisions, and that a decree-holder did not get a fresh start from the 1st January, 1862. This last view appears to be the correct one, and is supported by numerous rulings of the Calcutta Court.*

In the case of *Roghoonath Pershad v. Velaetee Begum*, W. R. 1864, MIS. 27, application had been made on the 12th September, 1862, for execution of a decree passed on the 5th June, 1855. In the absence of the judgment-debtor, the Court in which the application was made, passed an order to the effect that under the provisions of Section 2, Act XI of 1861, the application was in time, twelve years not having elapsed since the date of the decree. From this order the judgment-debtor appealed to the High Court, contending that under the provisions of Sections 20 and 21 of Act XIV of 1859, the application

* See the cases of *Lulleet Ram v. Saligram Singh*, 1 W. R. MIS. 9; *Kalee Chunder Chowdhry v. Ruttun Gopal Bhadooree*, 2 W. R. MIS. 1; *The Collector of Beerbhoom v. Raj Coomaree Dossee*, 2 W. R. MIS. 17; *Nawab Hazeer Mahomed Khan Kuzulbash v. Shahzada Mahomed Busseerooddeen*, 4 W. R. MIS. 13; *Dinomonee Banerjee v. Modhoosoodun Mookerjee*, 4 W. R. MIS. 24; *Bharut Singh v. Sadut Ali*, 5 W. R. MIS. 20; *Gopal Kissen Potedar v. Shurut Soonduree Dabea*, 6 W. R. MIS. 41.

was barred by limitation, no step to keep the decree alive having been taken within three years after the passing of that Act. The Court held this view to be correct. With reference to the words in Section 21, 'within three years next after the passing of this Act,' it was observed:— "Act XIV of 1859, was passed on the 5th May, 1859, so that the three years prescribed by the Section expired on the 5th May, 1862. Act XI of 1861, suspended the operation of Sections 19 to 23 of Act XIV of 1859, to the 1st day of January, 1862, but it did not alter the wording of Section 21. Indeed the peculiar wording of that Section, and its effect, were perhaps overlooked. The effect, however, has apparently been that parties having decrees in the predicament described in Section 21,—i. e., in force at the time of the passing the Act,—considered that as the operation of this and other Sections had been suspended until January, 1862, limitation would begin to run against them, not from the time of the passing of the Act, but from the time of its coming into operation. Act XI of 1861, however, does not say so. The words of the law are distinct, and the suspending Act did not alter them. As therefore, in the present case no application for execution was made within three years from the passing of Act XIV of 1859, we think that the application now made is out of time and cannot be enforced."

Much difficulty has been felt in construing the words, 'nothing in the preceding Section shall apply to any judgment, decree or order in force at the time of the passing of this Act.' It has been observed that read literally, and by themselves, these words would mean that nothing contained in Section 20, is to apply to decrees passed prior to the passing of Act XIV of 1859, and the result would be that where such a decree has not been fully satisfied within the twelve years allowed by the old law, or within three years after the passing of the Act, whichever shall have first expired, it cannot be executed after that

time, however diligent the decree-holder may have been within that time to enforce execution. This literal construction of the terms of the Section has been followed by the Bombay High Court in the cases of *Bai Udekvar v. Mulji Naran*, 3 Bom. A. C. 177; and *Makunda valad Balacharya v. Sitaram*, 5 Bom. A. C. 102.

A different construction has, however, been adopted by the Calcutta High Court. In the case of *Kangalee Churn Ghosal v. Bonomalee Mullick*, 7 W. R. 515, it was held by a Full Bench that Sections 20 and 21 may be read together, and that reading them together, the second Clause of Section 21 should be treated as a proviso to Section 20. In this connection their effect is as follows:—Under Section 20, it is enacted generally that no process of execution shall issue upon any decree more than three years old, unless some proceeding shall have been taken to keep it in force within the three years next preceding the application for execution. But by Section 21, this rule shall not apply to decrees which were obtained before the passing of Act XIV of 1859, upon which execution may issue without any prior proceeding having been taken, provided that the application to execute is made within twelve years from the date of the decree, or within three years from the passing of the Act, whichever shall first expire. If an application be made to enforce such a decree, more than twelve years from its date, or more than three years after the passing of the Act, the decree-holder can derive no advantage from the terms of Section 21, and will not be allowed to execute his decree, unless some proceeding shall have been already taken by him to enforce it within the time prescribed by Section 20. If such proceeding has been taken, an application to execute will not be barred, although the decree may have been in force at the time of the passing of the Act, and the application has not been made within the time limited by Section 21. Compare *Deegendur Narain Ghose v. Hur Kishore Dutt*, 8

W. R. 88; *Pogose v. Boistub Lall*, 2 Ind. Jur. N. S. 1; see also the earlier cases of *Gregory v. Jugut Chunder Bannerjee*, 5 W. R. MIS. 17; *Doorgachurn Roy v. Dinomoyee Dabea*, 6 W. R. MIS. 14; *Huronath Bose v. Muddun Mohun Chuckerbutty*, 6 W. R. MIS. 40; *Nowaraja Chowdhry v. Ramkanaye Doss*, 7 W. R. 330.

With reference to this conflict of opinion between the Calcutta and Bombay Courts, it is to be said, that while the view followed by the former Court may be supposed to be more in conformity with the intention of the Legislature, the view taken by the latter Court is in closer accordance with the language which the Legislature has actually used. But see the observations of PEACOCK, C. J., in the case of *Rhedoy Krishna Ghose v. Koylash Chunder Bose*, 13 W. R. F. B. 3.

SECTION 22.

No process of execution shall issue to enforce any summary decision or award of any of the Civil Courts not established by Royal Charter or of any Revenue Authority unless some proceeding shall have been taken to enforce such decision or award, or to keep the same in force within one year next preceding the application for such execution.

A DECREE-HOLDER applied in execution to make H, the son of the judgment-debtor, liable on the decree. The Court found that H was not the representative of the judgment-debtor, and gave him costs. It was held by the Calcutta High Court that the order for costs, was not a 'summary decision' within the meaning of this Section, but

was an 'order' within the meaning of Section 20, having been made by the Court in the course of executing a decree passed in a regular suit. *Oolfutoonnissa v. Mohun Lall Sookool*, 11 W. R. 98; *Poresh Narain Roy v. Dalrymple*, 9 W. R. 458.

In the case of *Ramdhan Mandal v. Rameswar Bhat-tacharjee*, 2 Ben. A. C. 235, it was observed that the words 'summary decision or award' as used in this Section, mean a decision of a Civil Court, not being a decree passed in a regular suit or appeal. It was held in this case that an order to pay costs relating to a petition to set aside a decree on the ground of fraud, which petition had been disallowed, is a 'summary decision' within the meaning of this Section, and must be enforced within one year from the date when it was passed.

In the case of *Manchharam Kalliandas v. Ratilal Lal-shankar*, 6 Bom. A. C. 39, it would seem to have been the opinion of the Bombay High Court that an order passed under Section 246 of Act VIII of 1859, for the release of property from attachment with costs, is a 'summary decision' within the meaning of this Section. It was decided in this case, that the year allowed by the Section, is to be reckoned excluding the day on which the application to enforce the summary decision is made.

Execution of the decrees of Mofussil Small Cause Courts, is subject to the limitation of three years provided by Section 20, and not to the limitation of one year prescribed by the Section under notice. *Panchanada Chetti v. Raman Chetti*, 1 Mad. 446.

An order awarding possession in proceedings instituted under Section 15 of this Act, is a 'summary award or decision,' to which the provisions of this Section are applicable. *In re Nubokissen Mookerjee*, 11 W. R. 188. A decision passed under Act XIX of 1841, on a claim to a share of certain property by right of succession, is a 'summary decision,' the execution of which will be governed

by the rule of limitation provided in this Section. *Fuzsun Beebee v. Mazedoonnissa Beebee*, 4 W. R. MIS. 6.

An award passed under any of the Regulations mentioned in Clause 6, Section 1 of this Act, is a 'summary award,' and cannot be executed after more than a year from its date. *Mohima Chunder Chuckerbutty v. Rajkoomar Chuckerbutty*, 10 W. R. 22.

SECTION 23.

Nothing in the preceding Section shall apply to any summary decision or award in force at the time of the passing of this Act, but process of execution may be issued either within the time now limited by law for issuing process of execution thereon or within two years next after the passing of this Act, whichever shall first expire.

PRECEDING SECTION NOT TO APPLY TO SUMMARY AWARDS IN FORCE AT THE PASSING OF THIS ACT.

THIS Section stands to Section 22, in the same relation in which Section 21 stands to Section 20, and the same difficulties might be expected to have arisen in construing it, which have been found in construing Section 21. But no case decided under it, would seem to have been reported.

SECTION 24.

This Act shall take effect throughout the Operation of Act. Presidencies of Bengal, Madras, and Bombay, including the Presidency Towns and the Straits' Settlement; but shall not take effect in any Non-Regulation Province or

place until the same shall be extended thereto by public notification by the Governor-General in Council or by the local Government to which such Province or place is subordinate. Whenever this Act shall be extended to any Non-Regulation Province or place by the Governor-General in Council or by the local Government to which such Province or place is subordinate, all suits

Trial of pending suits, &c., in any Non-Regulation Province or place to which the Act is extended.

which within such Province or place shall be pending at the date of such notification

or shall be instituted within the period of two years from the date thereof, shall be tried and determined as if this Act had not been passed; but all suits to which the provisions of this Act are applicable that shall be instituted within such Province or place after the expiration of the said period, shall be governed by this Act and by no other law of limitation, any Statute, Act, or Regulation now in force notwithstanding.

ACT XIV of 1859, was extended to the Tenasserim and Martaban Provinces, by a notification dated the 3rd June, 1859; * to Assam, by a notification dated 11th July, 1860; † to the district of Ajmere and the Province of Mhairwarah, by a notification dated the 31st January, 1861; ‡ to the district of Cachar, and to the districts of Hazareebaugh, Lohardugga and Bheerbhoom, and to the estate of Dhulbhoom, by a notification dated the 20th February, 1861; §

* Calcutta Gazette, 4th June, 1859, p. 1414.

† *ibid.* 25th August, 1860, p. 1847.

‡ *ibid.* 20th February, 1861, p. 502.

§ *ibid.* 23rd February, 1861, p. 527.

to the division of Kumaon, the districts of Jhansi, Jaloun and Lulletpore of the Jhansi division, and to the family domain of the Maharajah of Benares, by a notification dated the 20th March, 1862;* to the Sonthal Pergunnahs, by a notification dated the 8th December, 1862;† to the Central Provinces, by a notification dated the 1st May, 1863;‡ to the Arracan division of British Burmah, by a notification dated the 24th February, 1864;§ to the district of Nimar recently annexed to the Central Provinces, by a notification dated the 10th September, 1864;|| to the British cantonments within the limits of the Central India Agency, by a notification dated the 29th May, 1865;¶ to the Birjagogurh Tehseelee of the Jubbulpore district, by a notification dated the 9th February, 1866;** to the territories recently ceded by the Government of Bhootan, by a notification dated the 15th May, 1866;†† to Aboo and Anadra in the territories of the Rao of Serohi, by a notification dated the 31st October, 1866.‡‡

By a notification dated the 26th December, 1866, published in the Punjab Gazette of the 3rd January, 1867, Act XIV of 1869 was extended to the Punjab from the 1st January, 1867. With reference to this notification the Judges of the chief Court of the Punjab in a Circular dated the 23rd May, 1867, remark:—"Under Section 24 of the Act all suits pending on the 1st January, 1867, or which shall be instituted before the 1st January, 1869, must be tried and determined under the law of limitation heretofore in force, but all suits instituted on or after the 1st January, 1869, will come under the rules of

* Calcutta Gazette, 9th April, 1862, p. 1331.

† ibid. 13th December, 1862, p. 3955.

‡ ibid. 2nd May, 1863, p. 1329.

§ Gazette of India, 2nd March, 1864, p. 146.

|| ibid. 17th September, 1864,

p. 741.

¶ ibid. 3rd June, 1865, p. 730.

** ibid. 10th February, 1866, p. 284.

†† Calcutta Gazette, 30th May, 1866, p. 1080.

‡‡ Gazette of India, 10th November, 1866, p. 1513.

limitation laid down in the Act. It will be observed that it is only as regards the *trial and determination of suits* that the operation of the Act is postponed for two years under Section 24, and not as regards *execution of decrees*. The provisions of the Act relating to the execution of judgments, decrees, and orders came into immediate operation on the 1st January, 1867, the date on which the Act was extended to the Punjab." In the same Circular the points of difference between the rules of limitation contained in this Act and those formerly in force in the Punjab under the Judicial Commissioner's Circular No. 11 of the 13th March, 1859, are fully set forth.

In the case of *Ram Lochun Sirkar v. Prithee Ram Chowdhry*, 2 W. R. MIS. 43, the Calcutta High Court would seem to have considered that by the terms of this Section the operation of the Act was meant to be suspended for two years from the date of its extension to any Non-Regulation Province, as well in cases of execution as in the trial of suits. In this case an application made to the Deputy Commissioner of Gowalparah in Assam, on the 7th July, 1864, for execution of a decree passed by the late Sudder Court, was refused as not made within one year from the date of the decree, as required by the old Assam Rules. But it was held by the High Court, on appeal, that as the decree sought to be executed bore date the 30th December, 1861, execution could have been taken out under the old Assam Rules, at any time up to the 30th December, 1862; and that as before that date, namely, from the 11th July, 1862, Act XIV of 1859, had come into force in Assam, and the old Rules were consequently superseded, the provisions of Section 20 of Act XIV,—in conformity with which three years from the date of a decree is the time allowed for enforcing its execution,—applied to the case.

Since the annexation of the Province of Oudh, various rules of limitation have at different times been regarded

as being in force there. At first the general twelve years' rule was thought to have operation. Afterwards the provisions of the Punjab Code, whereby the period for bringing actions on debt or contract was reduced from twelve to six years, were extended to Oudh with operation from the 1st June, 1857. A new series of "Rules for the Limitation of Suits," was promulgated by the Oudh Judicial Commissioner's Circular Order, No. 51, dated the 26th March, 1859, with effect from the 1st October, of that year. In August, 1859, the sanction of Government was obtained to the extension to Oudh of Act XIV of 1859, but no notification to that effect was published. A fresh series of "Limitation Rules for the guidance of the Civil Courts in Oudh," in substance almost identical with the provisions of Act XIV, was promulgated by the Oudh Judicial Commissioner in his Circular Order, No. 104, dated the 4th July, 1860. These Rules, it appears, were intended to come into immediate operation, but it was provided that where the former Rules were, in any respect, more favourable to suitors, they should have the benefit of them for two years. No notification of the extension of the Limitation Act to Oudh has since been published by the Government, although it would seem that application has been made to the Government upon the subject.*

In the case of *Saligram v. Mirza Azim Ali Beg*, 10 Moore's I. A. 114, it was argued before the Privy Council, that the Rules prescribed in the various Circular Orders of the Judicial Commissioner of Oudh, were promulgated without any authority for that purpose; but the facts of the case did not in their Lordships' opinion require that issue to be determined.

In the case of *Shah Mukhun Lall v. Nawab Imtiaz-ood-Dowlah* 10 Moore's I. A. 362, the plaintiff by a suit instituted in the Court of the Civil Judge of Lucknow on

* This account of the somewhat unsatisfactory position in which the Law of Limitation stands in Oudh, is taken from the "Oudh Judicial Rules and Circulars from 1858 to 1862," pp. 233-244.

the 13th January, 1862, sought to recover certain sums of money advanced to the defendant. The last advance had been made in the year 1858, more than three years before the commencement of the suit, but there was evidence of a part-payment of the debt having been made by the defendant within that period. Three letters were also filed by the plaintiff, which were alleged to have been written by the defendant in acknowledgment of the debt. Of these letters two which were without signature were accepted as genuine by the Judge; but the third, which purported to bear the defendant's signature, was believed to be spurious. The Judge held the claim to be barred, and his decision was confirmed by the Judicial Commissioner. But on appeal to the Privy Council, their Lordships were of opinion that the suit having been instituted before Act XIV of 1859 came into operation in Oudh, must be held to be governed by the rules of limitation which were in force there at the date of its institution, and that under these rules, acknowledgment of a debt, either by part-payment, or by an unsigned writing, might suffice to renew the period of limitation. Their Lordships accordingly ordered the case to be remanded for a fresh trial of the issues between the parties, with reference to the rules of limitation in force in Oudh when the suit was instituted.

From the report of this case it might seem to have been understood by their Lordships of the Privy Council, that the Limitation Act was extended to Oudh in July, 1860, and, consequently, that it came into operation there in July, 1862. Such, however, as above explained, is not the case, the Limitation Act having never, as an Act, been extended to Oudh.

By Section 5, Act XVI of 1865, (an Act to remove doubts as to the jurisdiction of the Revenue Courts in Oudh in suits relating to land,) it is provided that no suit relating to any under-tenure cognizable under the Act shall be

debarred from a hearing under the Rules for the Limitation of Suits in force in the Province of Oudh, if the cause of action shall have arisen on, or after the 13th February, 1844. By Section 6 of the same Act it is further provided that suits cognizable under the Act which may have been rejected or dismissed on the ground that they were barred by lapse of time under the Rules of Limitation in force in the Province of Oudh, may be revived and heard on the merits, if the cause of action shall have arisen on, or after the date mentioned in the preceding Section of the Act.

APPENDIX A.

NOTES.

SECTION 1.

Page 9.—When limitation should be pleaded. In the case of *Roy Dinkur Dyal v. Sheo Gholam Singh*, 12 W. R. 215, it was observed that all the rulings of the Calcutta High Court, prior to the decision of the Full Bench in the case of *Payne v. Constable*, which allow the plea of limitation to be raised for the first time in special appeal, proceed on the view that the plea of limitation involves a question of jurisdiction, and may therefore be taken up at any stage of the case; but that as in the case of *Payne v. Constable* it had been laid down that the plea of limitation does not involve a question of jurisdiction, it must now be held that under Section 350 of the Procedure Code, a plea of limitation cannot be taken for the first time in special appeal.

In opposition, however, to the view expressed in the above case, see the ruling of the Bombay High Court in *Davlata bin Bhujanga v. Beru bin Yadoji*, 4 Bom. A. C. 197, in which it was said:—"The issue (of limitation) must be decided whenever raised, even if taken for the first time in the Court of special appeal."

Page 20.—Issue of limitation how to be tried. It is a matter within the discretion of the Court to try an issue of limitation either as a separate plea in bar, or in connection with the merits of the case. The ordinary rule is, that the plea of limitation, as a plea in bar, should be tried separately, the principle of law being that until the bar is removed the plaintiff cannot go into the merits;

but there may be cases in which it will be necessary first to investigate the facts, and then to apply the law. *Ma-homed Azim v. Sumeerooddin*, 12 W. R. 286.

Page 21.—**Registered plaint may be rejected by Court.** With the case of *Chetti Gaundan* cited in the text, compare *Pandurang Govind v. Balkrishna Hari*, 6 Bom. A. C. 125.

Page 23.—**Computing period of limitation.** The date on which a contract is made is to be excluded in reckoning the time allowed for its performance. The date on which a debt became payable, as, for instance, the day named in a bond for the repayment of money, is to be excluded in reckoning limitation. *Lakshuman Sakharam v. Ranu bin Sidoji*, 6 Bom. A. C. 51. The borrower has, in such a case, until the last moment of the day named for payment, and the lender's right to sue accrues not *on*, but *from* that day. *Palany Andy Pillay*, 4 Mad. 330. The day on which the cause of action arose is to be excluded in computing limitation. *Mundy Chinna Comarappa Setti v. Ramasamy Setti*, 4 Mad. 409. The time when a cause of action arises is equivalent to the day or date on which it arises. *Muhtab v. Ram Dyal*, 4 Agra, 319.

Page 26.—**Expiry of period of limitation at time when Court is closed.** A Moonsiff being absent on leave, his Court was closed by order of the district Judge. A plaintiff whose suit was properly maintainable in the Moonsiff's Court, on the day preceding the last day on which the suit could be filed, presented his plaint to the district Judge who refused to receive it. On an application to the Bombay High Court, it was held that as the Moonsiff's Court had been closed by the order of the district Judge, and the Judge of no other Court had been put in charge of the Moonsiff's Court for the purpose of receiving plaints, the presentation of the plaint to the district Judge must be considered a presentation to the proper Court, and as made within time. *Ganesh Sadashiv*, 5 Bom. A. C. 117.

Section 21, Act XI of 1865, allows a period of seven days from the date of the decision of a suit by a Judge of a Mofussil Small Cause Court, as the time within which a party dissatisfied with such decision may give notice of his intention to move for a new trial. A decision was passed by the Judge of a Small Cause Court on the 6th November, 1869. The time for giving notice of a motion for a new trial consequently expired on the 13th. But from the 12th to the 15th November, the Court was closed, these days being holidays. Notice of a motion for new trial presented upon the opening of the Court on the 16th November, was rejected by the Judge as out of time. But on a reference to the High Court it was held that as the law allows seven days for the purpose of giving notice, an applicant who is prevented from giving notice within that time by reason of the Court being closed, is entitled to give notice on the first day thereafter on which the Court is open and prepared to receive it. *Obhoy Nikaree v. Grija Booshun Haldar*, 13 W. R. 105. It may be doubted, however, whether the words of the Section cited admit of this construction.

Page 27.—**Extension of time for presentment of appeal.** With the ruling of the Agra High Court in *Syud Kootub Hossein*, cited in the text, compare *Kashinath Roy v. Mynooddeen Choudhry*, W. R. sp. 146, decided by a Full Bench of the Calcutta High Court.

Page 28.—**Application for review of judgment.** The limitation prescribed for an application for a review, does not apply to an application for correction of a clerical error in a decree, so as to make it in conformity with the judgment, *Modhoosoodun Ghose v. Ramanath Ghose*, 12 W. R. 65; but it will apply where the rectification sought would substantially alter the decision of the Court. *Oolfut-oonnissa v. Assur Ali*, 13 W. R. 33; *Rao Oomrao Singh v. Satun Lall*, 1 All. A. c. 77.

Page 31.—Review granted after time allowed by law without cause shewn for delay. In accordance with *Brindabun Chunder Roy*, cited in the text, see also *Kristo Gobind Joardar v. Jugobundhoo Sirkar*, 12 W.R. 94. A similar decision in respect of appeals was pronounced in the case of *Soorundarnath Roy v. Mowree Bewah*, 10 W. R. 178.

Page 32.—New exposition of law by superior Court, no cause for admitting review after time allowed by law has expired. With the cases cited in the text, compare *Makhan Naikin v. Manchand Ladhabbhai*, 5 Bom. A. c. 107. The decision of the Calcutta High Court in the case of *Tarinee Churn Ghose v. Sutto Surun Ghosal*, 12 W. R. 154, is not in accordance with the cases cited in the text, and may be thought open to doubt. See *Roy Goodur Suhaye v. Achebur Lall*, 13 W. R. 120.

Page 36.—Time for appealing to Privy Council. In calculating the period of six months allowed for appealing to the Privy Council, the date on which the decree appealed from was pronounced or dated, should be excluded. *Ramanoogra Narain*, 13 W. R. p. c. 17. In this case a petition of appeal presented on the 16th December, 1868, against a judgment pronounced on the 16th June, 1868, which had been rejected by a Division Bench of the Calcutta High Court as out of time, was held by the Privy Council to have been presented within time.

A High Court has power to strike off a petition of appeal to the Privy Council, where due diligence has not been used in transmitting the appeal. *Gobardhun Burmono v. Munun Bibi*, 3 Ben. o. c. 126.

Page 37.—Plaint filed on holiday. Stamp. By an order of the Board of Revenue, the Revenue Courts were authorized to be closed on the 10th April, 1868, that being Good Friday. A plaint for arrears of rent was filed with the Collector on that day. The plaint was engrossed on plain paper, but a sum of money sufficient to

cover the amount of the stamp duty was paid in by the plaintiff, and received by the Collector. It was contended that a plaint could not properly be received on a holiday, and if received on a holiday was to be considered as if received on the first day the Court sits after the holiday, and that as the Court did not open till after the period of limitation applicable to the plaintiff's claim had expired, he was out of time. But it was held that there was no illegality in the reception of the plaint on an authorized holiday, and that it was not necessary that it should be engrossed on stamped paper, when the full amount of the stamp duty was paid in. *Gobind Kumar Chowdhry v. Har-gopal Nag*, 3 Ben. AP. 72.

Page 41.—**Death of a defendant.** Where after issue of summons it is found that the defendant died before the institution of the suit, the Court has no jurisdiction to decide the suit. But in a subsequent suit by the same plaintiff, on the same cause of action, against the representatives of the deceased, the time during which the plaintiff was proceeding *bonâ fide* against the deceased may be deducted in computing limitation. *Mohun Chunder Koondoo v. Azem Ghazee*, 12 W. R. 45.

Page 42.—**Suits by Attornies &c., for work done.** In a suit by an attorney, vakeel, or mookhtear for payment of fees, the cause of action arises on completion of the work, unless some other time for payment has been expressly stipulated for. *Carruthers v. Menzies*, Coryton 40; and compare the cases cited, *ante*, pp. 85-86, 132-133.

Page 43.—**English and Native Calendars.** Where a bond for the repayment of money within one year bore a native date only, it was held that the year was to be calculated according to the native calendar of which the bond bore the date. *Lalji Vajjnath v. Rarji Abaji*, 6 Bom. A. C. 136.

In a suit brought to recover the price of an elephant sold by the plaintiff to the defendant in the beginning of

the year 1863, the plaintiff to rebut the defence of limitation, put in a letter signed by the defendant in which the latter admitted the debt and promised payment. This letter was dated the 8th Assar, 1270, *Fuslee*, corresponding with the 9th June, 1863. The plaintiff's suit was brought on the 5th Assar, 1273, *Fuslee*, corresponding with the 3rd July, 1866. The plaintiff contended that time should be computed according to the *Fuslee* calendar, which was the mode of reckoning followed in the defendant's letter, and according to which his suit was brought within three years, and not by the English calendar, according to which the suit was brought beyond three years. But it was held that the law of limitation being a law of procedure, the calendar and method of computing time recognized by the law of the Court in which the proceedings were taken must govern the case; and that the plaintiff being out of time according to the English calendar, his suit was barred. *Lal Rung Pal Singh v. Joymungul Singh*, decided by a Division Bench of the Calcutta High Court on the 16th February, 1870.

Page 52.—Cause of action in suit to set aside an adoption. A reversionary heir may during the widow's lifetime maintain a declaratory suit to set aside an adoption by a widow as invalid. But where a reversioner seeks to recover possession of the lands of his ancestor by setting aside an adoption made by the widow, the right of action does not accrue until the widow's death. *Sreenath Gangooly v. Mohesh Chunder Roy*, 12 W. R. F. B. 14.

Cause of action in suit to prevent waste. In a suit by a reversioner to prevent waste, the cause of action accrues when there seems to be a likelihood of waste being committed. *Amirtamayi Dasi v. Grose*, 4 Ben. o. c. 1.

Page 54.—Suit on a decree. With the cases cited in the text, compare *Chunder Narain Ghose v. Gouri Nath Bose*, 4 W. R. s. c. 7, where it would seem to have been the opinion of the Court that in some cases a suit might

be maintained on a decree of a Court in this country But compare *K. Sanjeeviah v. Nanjiyah*, 4 Mad. 453, and see *ante*, pp. 227-228.

Page 61.—Long uninterrupted possession confers title. The decision of the Privy Council in *Gunga Gobind Mundul*, was followed by the Calcutta High Court in the case of *Rajah Borodakant Roy v. Prankisto Parooee*, 12 W. R. 192; and by the Agra High Court in the case of *Chundoo Lall v. Rughoo Nath Roy*, 3 Agra, 195.

Page 62.—Prescription. Clause 1, Section 1, Regulation V of the Bombay Code. In connection with the cases cited in the text, see also *Ramchandra bin Madhavrav v. Abaji valad Yes*, 1 Bom. 64. When a religious office with lands attached thereto, is held by several *gurus* in succession, each holding such office by virtue of an appointment made on his accession, no proprietary right can be acquired by such *gurus* in the office or lands, against the patron or owner, by prescription, as such a case does not fall within the meaning of the Regulation cited. *Teatat Soami Guru v. Andanya Charanti Guru*, 6 Bom. A. c. 132.

Page 65.—User for twelve years at least required to establish a prescriptive right. In connection with the cases cited in the text see also *Kristo Chunder Burnick v. Kristo Chunder Chuckerbutty*, 12 W. R. 76; *Roop Chunder Ghose v. Roop Moonjuree Dossee*, 12 W. R. 274.

Page 66.—Prescriptive easement. To create an easement by prescription over the property of another, the user must have been uninterrupted and exercised as of right. *Mallik Javad-ul-Huq v. Ramprasad Das*, 3 Ben. A. c. 281. Where an easement is enjoyed by a tenant by permission of his landlord, no length of user will confer a prescriptive right. *Kesava Pillai v. Peddu Reddi*, 1 Mad. 258. Compare *Krishna v. Rayappa Shanbhaga*, 4 Mad. 98. Where land has been used from time immemorial by the inhabitants of a *Mohulla* for the purpose of burying

their dead, any claim to the exclusive possession of the land by the zemindar which would interfere with such user, is excluded. *Mohun Lall v. Shaikh Noor Ahmed*, 1 All. 116. Where A has an ancient right to have the water falling on his roof discharged on an adjoining piece of land, any person acquiring that land, must exercise the right of ownership so as not to interfere with A's easement. *Sheonath Singh v. Bishonath Singh*, 3 Agra, 191. But compare *Joy Narain Singh v. Lall Monee Dossee*, 11 W. R. 508. The right of a riparian owner to the water of the stream on which his property is situated is not a prescriptive right; but a right naturally incident to his property in the land. *Leelanund Singh v. The Rajah of Durbangah*, 13 W. R. 48.

Page 67.—**Abandonment of user.** A plaintiff sued to establish his right to a water-course. It was found that he had allowed it to be filled up, without objection, on another water-course of the same description being made, and that he had used the second water-course for upwards of a year. The plaintiff was held to have abandoned his right of user in the first water-course. *Jugobundhoo Chuckerbutty v. Jugut Chunder Chowdhry*, 12 W. R. 519.

Page 71.—**Ancient lights and air.** In addition to the cases cited in the text, note also, *Pranjivandas Harjivandas v. Mayaram Samaldas*, 1 Bom. 148; *Lackersteen v. Tarucknath Poramanick*, Coryton, 91.

Page 72.—**Invasion of privacy by opening windows.** The decision in the case of *Manishankar Hargovan*, cited in the text, was followed by the Bombay High Court in the case of *Kuvarji Premchand v. Bai Javer*, 6 Bom. A. C. 143, in which it was held that where a house-holder's privacy is invaded by the opening of new doors and windows in his neighbour's house, his right of action, by the usage of Gujarat, to have such doors and windows closed, is not altered by the fact that a public road runs between his and the defendant's lands.

SECTION 1, CLAUSE 1.

Page 74.—**Pre-emption.** Where a mortgagee in possession purchases the mortgaged property, a claimant seeking to enforce the right of pre-emption, must sue within one year from the date of the purchase by the mortgagee. *Mahomed Banazeer v. Gunga Ram*, 4 Agra, 260.

Where the mortgagor sells lands which at the time of sale are in the usufructuary possession of the mortgagee, a claimant who seeks to enforce his right of pre-emption as against the buyer must bring his suit within one year from the date when the sale was completed. Limitation is not to be reckoned from the date when the buyer actually assumes possession after redeeming the property from the mortgagee. *Ganeshee Lall v. Toola Ram*, 4 Agra, 376.

SECTION 1, CLAUSE 2.

Page 82.—**Injury to crops.** It has been held by the Bombay High Court that a suit for damages for injury to crops is 'a suit for damages for injury to personal property,' within the meaning of this Clause. *Kashidas Govindbhai v. The B. B. & C. I. Railway Company*, 6 Bom. A. C. 114.

Page 84.—**Malicious prosecution.** A suit cannot be brought for a malicious prosecution when the prosecution terminates in the conviction of the person against whom it is directed. But where a charge is not prosecuted to a conviction in a Criminal Court, but is dropt by the prosecutor while the matter is under investigation by the Police, a cause of action to the party who has been wrongfully charged may be taken to have accrued when the information against him was first laid. *Bhyrub Chunder Chuckerbutty v. Mohendro Chuckerbutty*, 13 W. R. 118.

SECTION 1, CLAUSE 3.

Page 88.—**Suit to set aside execution sale on ground of fraud.** The limitation provided by this Clause does not apply to a suit by a judgment-debtor to set aside an exe-

cution sale, on the ground that the decree-holder fraudulently got the property sold in execution of a previously satisfied decree. Nor will the provisions of Section 256 of Act VIII of 1859, be a bar to such a suit. *Budree v. Lokeman*, 4 Agra, 89.

Page 98.—Claim by third party to land sold in execution. With the case of *Kripanath Roy v. Nitokalee Dabea*, cited in the text, compare *Mahomed Buksh v. Mahomed Hossein*, 4 Agra, 171.

Page 102.—Irregularity in sale of moveable property. The terms of Section 252, Act VIII of 1859, which provide that no irregularity in the sale of moveable property in execution shall vitiate the sale, will not prevent a claimant from contesting the right, title, and interest of the judgment-debtor in the property sold, at any time within the period allowed by this Clause. *Hirdey Beebee v. Besheshur Pershad*, 3 Agra, 175.

SECTION 1, CLAUSE 5.

Page 106.—Suit to declare decree collusive. A suit not to invalidate an order passed under Section 246, Act VIII of 1859, but for a declaration that the decree in execution whereof the order had been passed, is in itself invalid, as having been fraudulently and collusively obtained, is not governed by the provisions of this Clause. *Ramanunda Butt v. Bithee*, 4 Mad. 263.

Claims by third parties. This Clause only applies to orders which the Civil Courts are empowered to pass deciding matters of dispute properly raised for hearing and determination by a summary proceeding between the parties disputing. By an order passed by a Civil Court in execution of a decree to which he was not a party, A was ejected from the possession of certain lands. More than three years afterwards he brought a suit for recovery of possession against the legal representative of the person who had been put into possession. It was held by

the Madras High Court that the suit was not barred. *Appundy Ibram Sahib v. Maria Varden Seth Sam*, 4 Mad. 297.

Page 107.—Suit by judgment-debtor against claimant in whose favour attached property has been released. In opposition to the decision of the Calcutta High Court in *Nitta Kolita v. Bishnuram Kolita*, see the case of *Netietom Perengaryprom v. Tayanbarry Parameshwarcaren Nambudry*, 4 Mad. 472.

Page 111.—Effect of dismissal of claim for arrears of rent under Section 77, Act X of 1859. With the case of *Kundurp Narain Singh v. Bundoo Ram Sein*, cited in the text compare *Chundro Seekhur Roy v. Nobin Soondur Roy*, 2 W. R. 197, and *Ram Komul Sein v. Prossonno Moyee*, 8 W. R. 294.

SECTION 1, CLAUSE 6.

Page 112.—Disputed boundaries. By Section 5, Act I of 1847,—an Act for the establishment and maintenance of boundary marks in the North West Provinces of Bengal,—it is provided that disputed boundaries shall be fixed by Revenue Officers under the powers and in the manner prescribed in Regulations VII of 1822, and IX of 1833, and shall be similarly open to appeal. An adjudication of boundaries by the Revenue Authorities under Act I of 1847, is therefore, like awards made under the Regulations cited, open to question by regular suit brought within the three years fixed by this Clause. *Shaik Sujjad v. Syud Sabit Ali*, 4 Agra, 140. A *thakbust*—survey—award of boundaries made in the Lower Provinces, may be an award under Regulation IX of 1825, within the meaning of Act XIII of 1848, and consequently within the meaning of this Clause. *Sahib Prahlad Sen v. Rajendra Kishore Singh*, 2 Ben. P. C. 111, 137.

Page 113.—Survey award without possession. A survey award not followed by possession is no answer to a plea of adverse possession for more than twelve years after the

date of the award. *Jugut Chunder Roy v. Alyat Chinaman*, 5 W. R. 242.

Page 119.—Survey authorities cannot interfere with decree of Civil Court. With the case of *Anund Chunder Roy v. Huro Nath Roy*, cited in the text, compare *Bunsee v. Ramsookh*, 4 Agra, 384.

SECTION 1, CLAUSE 7.

Page 125.—Order respecting possession of property. A and B disputed for the possession of certain lands. The magistrate on a finding that neither of the parties was in possession, ordered the lands to be attached. The lands were subsequently released from attachment. During the attachment A had erected a building upon the lands. On their release B sued A for the removal of the building. It was contended that the suit was out of time, as not brought within three years from the date of the Magistrate's order for the attachment of the lands, but it was held by the Agra High Court that that order was not "an order respecting the possession of property" within the meaning of this clause, and that the only limitation applicable was that of twelve years under Clause 12. *Chuj Mull v. Khyratee*, 4 Agra, 65.

An order passed by a Magistrate under Act IV of 1840 against a *benameedar*, in whose name the property in respect of which the order was made, had been purchased, but who had no right or title in the property, and no authority from the owner to conduct the proceedings in the Act IV case, has been held not to be a binding order against the owner of the property. *Mohendronath Mullick v. Rakhal Doss Sirkar*, 10 W. R. 344

SECTION 1, CLAUSE 9.

Page 132.—Remuneration for work and labour. A physician may maintain a suit to recover payment of his fees, at any time within three years from the date when his cause of action accrues. *Hurish Chunder Surmah v. Brojonath Chuckerbutty*, 13 W. R. 96.

Page 138.—**Account stated.** With the case of *Umedchand Hukamchand*, cited in the text, compare *Mahim-patray Chandraray v. Nensuk Anandray Shet Marvadi*, 4 Bom. A. C. 199.

SECTION 1, CLAUSE 10.

Page 143.—**Written contract.** A writing signed by S in these terms :—"24th October, 1864. S holds Rs. 475, which sum is the property of L,"—was held by the Madras High Court not to be a written contract or engagement between S and L, within the meaning of this Clause. *Lakshmanaiyan v. Sivaswamy*, 4 Mad. 216. A suit for the amount due on a Policy of Marine Insurance is governed by the provisions of this Clause. In such a suit limitation is to be reckoned from the date when the defendant has notice of the loss, and fails or declines to pay. *Narotandas Bhagandas v. Dayabhai Ichhachand*, 6 Bom. A. C. 34.

Page 144.—**Written contract not admitting of registration.** In addition to the cases cited in the text, see also, *Chunder Sein v. Gujadhur Lall*. 1 All. A. C. 148.

Registered promissory note. As to the time within which a suit may be brought by the payee against the maker, and by the endorsee against the endorser of a registered promissory note, see, *ante*, p. 226.

SECTION 1, CLAUSE 12.

Page 150.—**Suit for dispossession. Cause of action. Onus of proof.** The decision of the Bombay High Court in the case of *Pandurang Gorind v. Balkrishna Hari*, 6 Bom. A. C. 125, is deserving of much attention. The Court said :—"The burden of proof being upon the plaintiff, what is he required to prove? Simply, that the cause of action accrued within the period of limitation made applicable to the suit. This is by no means equivalent to saying that a plaintiff in an action of ejectment must prove that he has been in possession within twelve years. He may not have been in possession within twelve years, and yet the cause of action may have accrued within that

period. If a man buy a piece of open ground he is not bound to enclose it, or to build upon it, or formally to take possession of it; nor, if he does formally take possession of it, is he bound to proclaim by subsequent acts the continuance of his possession. So long as the land remains unoccupied his rights are not interfered with, and he is not called upon to assert them. He has no cause of action and there is no person whom he can sue. His cause of action accrues when another person takes possession of the land, and not before. If he has omitted to take possession of the land, himself, he may not be able to treat the intruder as a trespasser; but he can bring an action to eject him at any period within twelve years from the date of the intruder's occupation of the land."

Page 151.—**Purchaser at execution sale.** A purchaser at a sale in execution of a decree, stands in the same position as the person whose rights he buys, and if a suit by the latter for possession would be barred, so also will a suit by the former. *Enayet Hossein v. Giridhari Lal*, 2 Ben. P. C. 75.

Page 155.—**Attachment in execution.** Where property is attached in execution of a decree, the person whose property is attached is not thereby dispossessed. *Malraja v. Narayanaswamy*, 4 Mad. 281.

Page 157.—**Permissive possession.** Where possession is permissive, no length of possession confers title on the possessor. *Gunga Deen Chowdhry v. Hur Sahai Singh*, 4 Agra, 261; *Rakhal Doss Mudduck v. Modhoosoodun Mudduck*, 12 W. R. 319. Where a plaintiff alleges that the possession of the defendant has been permissive or fiduciary, it is for him to prove his allegation. *Oomrao Begum v. Syud Hamid Jan*, 4 Agra, 279.

Page 158.—**Landlord and Tenant.** Where in a suit to recover possession, the defendant pleads limitation, and the plaintiff proves that the commencement of the possession of the person through whom the defendant claims

was as tenant, it will be for the defendant to show when the nature of the possession was changed, and how it became adverse. *Ramdhun Satra v. Nobin Chunder Chowdhry*, 12 W. R. 250.

Page 159.—**Ejectment. Mokurrureedar.** In a suit to eject the defendant from certain lands which the plaintiff alleged had been held by the defendant under a temporary lease which had expired, the defendant pleaded that he and his ancestors had held the land for generations as *mokurrureedars*. The Court was of opinion that if the defendant was able to show that for more than twelve years prior to suit he had been holding as *mokurrureedar* to the knowledge of the plaintiff, the suit would be barred. *Tekaitnee Goura Coomaree v. The Bengal Coal Company*, 13 W. R. 129.

Page 166.—**Immoveable property. Office of hereditary priest.** The office of hereditary priest to a temple, though not annexed to, nor held by virtue of the ownership of any land, yet being by Hindoo law classed as immoveable property, should in a suit between Hindoos be held to be immoveable property within the meaning of this Clause. *Krishnabhat bin Hiragange v. Kapabhat bin Mahabhat*, 6 Bom. A. C. 137.

Page 168.—**Malikana.** On appeal from the decision of the Division Court in the case of *Bhoobee Singh v. Nehmoo Bohoo*, the judgment of KEMP, J., was confirmed by a Bench of three Judges. PEACOCK, C. J., said :—“*Malikana* is not rent, nor has it the elements of rent. It is a right to receive a portion of the profits of the estate for which the Government has made a settlement with another person, the real proprietor having neglected to come in and make a settlement. It being a right to receive something out of the collections of the estate, it is an interest in immoveable property, and consequently Section 12 of Act XIV of 1859, applies to this case. The decision of Mr. Justice Kemp, is in conformity with all the previous

decisions on the subject which have held that the right to collect *malikana* is barred, if the *malikana* has not been received for a period of twelve years." 12 W. R. 498. A suit for a *malikana* allowance concerns the proprietary right in land as much as a suit for the land itself. *Mahomed Keramutoollah v. Abdool Majeed*, 1 All A. c. 205.

Page 169.—**Hakk.** Where a *hakk* is not charged upon or payable out of land, a suit for its recovery must be brought within six years from the date of the last payment made on account of it. *Raiji Manor v. Desai Kallianrai Hukmutrai*, 6 Bom. A. c. 56.

Page 170.—**Alienation by Hindoo widow. Reversioner.** In accordance with the cases cited in the text, see also *Indurjeet Koonwar v. Raj Koonwar*, 13 W. R. 52.

Page 171.—**Suit to set aside an adoption.** The case of *Sreenath Gangooly v. Mohesh Chunder Roy*, cited in the text, will be found reported in 12 W. R. F. B. 14.

Page 172.—**Near and remote heirs.** Where a claim to property is based on the law of inheritance, a plaintiff's suit cannot be maintained, when there are nearer heirs of the deceased ancestor who have not disclaimed their rights. *Gooshaeen Teekumjee v. Pursotum Lalljee*, 4 Agra, 238.

Page 175.—**Suit by reversioner for possession of property of which the female heir has never held possession.** In accordance with the decision of the Full Bench in *Nobin Chunder Chuckerbutty*, see also *Ram Kanai Roy Chowdhry v. Trilochan Chuckerbutty*, 1 Ben. s. n. 13.

Page 178.—**Power of widow to compromise litigation.** With the case of *Seeboopersad Dass* cited in the text, compare *Tarini Charan Ganguli v. Watson*, 3 Ben. A. c. 437.

Page 183.—**Alienation under the Mitakshara law.** According to the Mitakshara law as construed by the Bengal Courts, the alienation of joint undivided property by one of several joint owners is not valid even for the aliena-

tor's own share. *Sadabart Prasad Sahu v. Foolbash Koer*, 3 Ben. F. B. 31; compare *Chedee Sahee v. Nuthoo Lall Chowdhry*, 12 W. R. 446.

SECTION 1, CLAUSE 13.

Page 184.—**Presumption of continuance of joint right under Hindoo Law.** The general rule that the possession of one member of a joint Hindoo family is the possession of all the members, does not apply where the party claiming has clearly been excluded from the family. In such a case, the possession is adverse, and under the general law of limitation the time will run from the date of such adverse possession. *Jowala Buksh v. Dharum Singh*, 10 Moore's I. A. 511.

Page 187.—**Claim for share in joint family property. Exclusive possession.** With the case of *Subhaiyan v. Sankara Subhaiyar*, cited in the text, compare *Abbakka v. Ammu Shettati*, 4 Mad. 137; *K. Subhaiya v. K. Rajeswara Sastrulu*, 4 Mad. 354. *Maharajulungaru v. Rajah Row Puntulu*, 5 Mad. 31.

SECTION 1, CLAUSE 14.

Page 197.—**Lakheraj. Sixty years peaceable possession.** With the case of *Chundrabullee Dabea*, cited in the text, compare *Kasheenath Kooncar v. Bunko Beharee Chowdhry*, 12 W. R. 440.

SECTION 1, CLAUSE 15.

Page 209.—**Oral evidence not receivable to vary terms of written deed.** In addition to the cases cited in the text, note also *Gangadhar Samant v. Madhab Chandra Roy*, 3 Ben. A. C. 83.

Page 214.—**Acknowledgment by agent of mortgagee.** An unauthorized acknowledgment by the agent of a mortgagee of the mortgagor's title, does not renew limitation under this Clause. *Lutchmee Buksh Roy v. Runjeet Ram Pandey*, 12 W. R. 443.

SECTION 1, CLAUSE 16.

Page 227.—**Suit to recover money paid under a decree**

afterwards set aside on appeal. A sued B for arrears of rent at the rate of Rs. 59, by the year, but obtained a decree at the rate of Rs. 25, only, in the Court of first instance. The lower appellate Court allowed the claim at the higher rate. On special appeal, this decision was set aside and the rate decreed by the first Court was confirmed. In the meanwhile, A had sued out execution on the decree of the lower appellate Court, and had realized rent at the higher rate. On judgment being pronounced by the High Court in special appeal, B applied to the Collector to recover the sum which he had paid in excess of the rate finally allowed, but the Collector refused to interfere. B then sued in the Civil Court for a refund of the excess amount. It was held that the suit was maintainable, and that the limitation to be applied was that of six years under this Clause, to be reckoned from the date when the decision of the Court of first instance was confirmed by the High Court. *Hur Dyal Mundul v. Tirthanund Thakoor*, 13 W. R. 34.

Page 228.—**Suit to enforce a decree.** A suit does not lie to enforce a liability specifically imposed by the decree of a Civil Court in the Mofussil, the right of suit in such a case being taken away by Section 11, Act XXIII of 1861. *K. Sanjeeviyah v. Nanjiyah*, 4 Mad. 453.

SECTION 2.

Page 237.—**Trust. Cause of action.** Where property is placed in the hands of another by way of trust, it has been held that no cause of action arises to the owner until he has made demand for restoration, and the trustee has refused to give up the property. As against the owner suing to recover such property, limitation is to be reckoned from the date of such refusal, or from the date of a distinct assertion by the trustee of an adverse right, and not from the date when the trustee entered into possession. *Rakhal Doss Mudduck v. Modhoosoodun Mudduck*, 12 W. R. 319.

SECTION 4.

Page 246.—Signature of acknowledgment by agent. In accordance with the decision in the case of *Budhoo-bhoosun Bose*, cited in the text, see also *Parshotam Manch-haram v. Mirza Abdul Latif Khan*, 6 Bom. o. c. 67.

Page 250.—Acknowledgment may be made to a third party. See the decision of the Madras High Court in the case of *Nijamuddin v. Mahammad Ali*, 4 Mad. 385, in which the ruling of LEVINGE, J., in the case of *Persaud Dass Dutt* was referred to, and distinguished.

SECTION 15.

Page 296.—Summary suit for possession. Appeal. Stamp. Section 26, Act XXIII of 1861, cited in the text, provides that no appeal shall lie from any order or decision passed in any suit instituted under Section 15, Act XIV of 1859. But by Clause 2 of Schedule No. 1, attached to Act VII of 1870,—The Court Fees Act,—an *ad valorem* fee of one half the amount chargeable on an ordinary plaint or memorandum of appeal, is to be charged on a plaint or *memorandum of appeal* in a suit for possession brought under this Section. The introduction of the words ‘or memorandum of appeal,’ as applicable to such suits, must be regarded as an oversight.

Page 299.—In a suit for possession brought after six months from date of dispossession, the plaintiff must prove title. With the case of *Greesh Chunder Roy Chowdhry*, cited in the text, compare the decision of the Madras High Court in the case of *Achumande Agath Kunhi Pathumah v. Makachinde Agath Makachi*, 4 Mad. 478. In this case a Magistrate under Section 319 of the Criminal Procedure Code, had evicted A who had been in possession of certain lands, and had placed B in possession thereof, until the rights of the parties should be determined by the Civil Court. It was held that in a suit to recover possession brought more than six months from the date of dispossession, A was bound to prove his title.

Page 300.—**Party restored to possession entitled to crops: and to mesne profits.** A party recovering possession of land in virtue of an order passed under this Section, recovers therewith the crops growing thereon, and is entitled to cut the same. *Shirajdee Pramanick v. Emam Buksh Biswas*, 13 W. R. 104. After recovering possession of land in a suit brought under this Section, a plaintiff brought a second suit to recover mesne profits collected by the defendant while in possession. It was held by a Bench of three Judges, reversing the decision of a Division Bench, that the decree in the first suit was sufficient *prima facie* evidence of the plaintiff's title to enable him to maintain his suit for mesne profits. *Radha Churn Ghuttuck v. Zameerutoonnissa*, 9 W. R. 590; 11 W. R. 83. Compare *Bhawanees Deen Sahoo v. Mohun Sahoo*, 1 All. A. C. 188.

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SECTION 16.

Page 304.—**Minor. Ratification of contract.** A during his minority sold certain lands to B. Eleven years after he attained majority, and nearly twelve years from the date of sale, A sued B for the restoration of the lands. It was held by PHEAR, J., that as the plaintiff had allowed so long a time to elapse after attaining majority, without taking any steps to repudiate his contract, it was to be presumed that the consideration for the contract was of such a character as to bind him, or that after coming of age, he had ratified the contract. *Ram Kishore Dey v. Boiddonath Dey*, 13 W. R. 166. Compare *Ram Narain Doss v. Doorga Churn Shaha*, 13 W. R. 172.

SECTION 18.

Page 311.—This Section has been repealed by Act XIV of 1870.

SECTION 19.

Page 313.—The proviso of this Section is repealed by Act XIV of 1870.

SECTION 20.

Page 321.—**Computation of time within which execution may issue.** The three years within which execution must be applied for, are, in cases of appeal, to be reckoned from the date of the decree in the Appellate Court. *Buldeo v. Guj Singh*, 1 All. A. c. 161.

Page 330.—**Dilatoriness of Court executing decree.** With the cases cited in the text, compare the case of *Gooroo Doss Dutt v. Ooma Churn Roy*, 13 W. R. 83, in which it was observed that although it is the duty of the Court to issue process after application has been made for execution, yet the law fully intends that when the decree-holder sees that the Court has taken no steps to issue any process, he shall be diligent, and move the Court from time to time as required, to keep himself within the period of limitation.

Page 336.—**Joint decree in favour of several plaintiffs.** A joint decree in favour of several plaintiffs, is kept alive by proceedings taken to enforce it by any one of them. *Aodh Beharee Lall v. Brojo Mohun Lall*, 13 W. R. 128.

Page 339.—**Proceedings in execution taken against a judgment-debtor, do not keep the decree alive as against a surety, who was no party to the original suit.** With the case of *Hurkoo Singh*, cited in the text, compare *Gujendro Narain Roy v. Hemanjinee Dossee*, 13 W. R. 35.

Page 341.—**Unnecessary application.** An application purporting to be made in furtherance of the execution of a decree, but which the judgment-creditor cannot in reason expect to be successful, and which is not followed up by any other proceeding within three years, cannot be said to be a *bonâ fide* effort to enforce the decree. *Modhoomothy Dabea v. Dhunput Singh*, 13 W. R. 164.

Page 342.—**Three years next preceding application for execution.** In connection with the case of *Brojo Beharee Sahay*, note also *Biswasoo Koonwar v. Khodie Lall*, 13 W. R. 122.

Page 358.—**Agreement between parties does not extend time for execution of decree.** An application for execution cannot be brought down to a later date than that on which it was made, by any agreement between the decreeholder and judgment-debtor to postpone execution. *Modhoomothy Dabea v. Dhunput Singh*, 13 W. R. 164. It has been decided by the Madras High Court that process of execution cannot issue to enforce a *raminamah* filed in a suit, until a decree has been passed in the suit, embodying its terms. *Sait Giridharadoss v. Rajah Suraneni Lakshmi Venkamma Row*, 5 Mad. 93.

Page 358.—**Appeal from decision declaring execution barred.** Under Section 11, Act XXIII of 1861, an appeal lies from a decision as to whether the execution of a decree is barred or not. *Hari Vishnu v. Gopal bin Ragji*, 6 Bom. A. C. 181.

SECTION 21.

Page 359.—This Section is repealed by Act XIV of 1870. The construction of the Section followed by the Calcutta High Court in the case of *Kangalee Churn Ghosal*, was concurred in by the Madras High Court in the case of *Karuppanan v. Muthannan Servey*, 5 Mad. 105.

SECTION 23.

Page 364.—This Section is repealed by Act XIV of 1870.

APPENDIX B.

ACTS POSTPONING THE OPERATION OF ACT XIV OF 1859.

ACT No. XI OF 1861.

Passed by the Legislative Council of India. Received the assent of the Governor-General, on the 1st May, 1861.

I. ALL suits now pending, or which shall be instituted before the 1st day of January, 1862, shall be tried and determined as if Act XIV of 1859 (*to provide for the Limitation of Suits*) had not been passed.

II. Sections XIX, XX, XXI, XXII, and XXIII, of the said Act, shall not take effect or have any operation before the said 1st day of January, 1862.

ACT No. XXXII OF 1861.

Passed by the Legislative Council of India. Received the assent of the Governor-General on the 7th September, 1861.

WHEREAS it is expedient to postpone the operation of so much of Act XIV of 1859, (*to provide for the Limitation of Suits*) as limits the period for the commencement of suits for the amount of bills for articles sold by retail; It is enacted as follows:—

That part of Clause 8 of Section I of the said Act which relates to bills for articles sold by retail, shall not take effect or have any operation before the 1st day of July, 1862.

ACT No. XIV of 1862.

Passed by the Legislative Council of India. Received the assent of the Governor-General, on the 23rd April, 1862.

WHEREAS it is expedient to postpone the operation of
Preamble. so much of Act XIV of 1859 as
limits the period for the commencement of suits for the
amount of bills for articles sold by retail where the cause
of action arose before the passing of that Act; It is enacted
as follows:—

I. All suits that may now be pending or that shall be
instituted before the 1st of Jan-
Suits now pending or
instituted before 1st Jan-
uary, 1865, for articles sold
by retail, in cases wherein
cause of action arose before
the passing of Act XIV of
1859, to be tried and deter-
mined as if that Act had
not been passed.
uary, 1865, to recover the amount
of bills for any articles sold by
retail, shall, in all cases in which
the cause of action arose before the
passing of the said Act XIV of
1859, be tried and determined as
if that Act had not been passed.

I N D E X.

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WITH NOTES OF CASES DECIDED UPON THE DIFFERENT SECTIONS BY THE COURTS AT
CALCUTTA, MADRAS, BOMBAY, AND AGRA, WITH AN APPENDIX CONTAINING AN
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COUNCIL, SMALL CAUSE COURT ACT,
EVIDENCE ACT, LIMITATION ACT,
REGISTRATION ACT,
STAMP ACT, &c.

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